Supreme Court, U.S.
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89-1136

In The

Supreme Court of the United States

October Term, 1989

RONALD McDONNELL, SUBSTITUTED FOR LEE RUWE,

Petitioner,

v

THE BOARD OF COMMISSIONERS, CANYON COUNTY, IDAHO

Defendant-Respondent.

ON WRIT OF CERTIORARI

TO THE SUPREME COURT OF IDAHO

PETITION FOR WRIT OF CERTIORARI

Ronald McDonnell, *pro se*

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QUESTIONS PRESENTED

Whether Canyon County, State of Idaho, can be allowed to keep an invalidly enacted Comprehensive Plan, Area of City Impact Ordinance, and 1979 Canyon County Zoning Ordinance, which were passed in violation of Idaho statutes and in violation of the due process clause of the Constitution of the United States, thereby affecting every resident of Canyon County since there are presently other cases pending in district court?

The issues were clearly presented to the Third District Court of the State of Idaho and to the Supreme Court of Idaho[1] but the questions were sidestepped at every level. The constitutional question is whether the notice was sufficient to satisfy due process. Idaho Code § 67-6511 (b) required notice to be given by mail before amending a zoning ordinance and changing a zone. That such notice was not given has been admitted, but this issue was not addressed by either Court.

Furthermore, the issue is that the notice that was given did not satisfy due process or abide by the procedures mandated by the statute in that •said notice did not state that down-zoning would occur; •no legal descriptions were given; •no names of property owners affected by the proposed zone changes were listed; •no maps were on file in the zoning office as advertised; •no notice was given to radio or television stations or other papers as a public service announcement; and •no public hearings were held to hear testimony on the changes made to the proposed ordinance--all in violation of Idaho Code §§ 67-6509 and 67-6511, as well as the provision in Idaho Code § 67-6514 which requires the County to amend their existing zoning ordinance, not repeal their old ordinance and pass an entirely new ordinance. Canyon County was required by this statute to amend their existing 1965 zoning ordinance and to give mailed notice to amend the district boundary changes; this they did not do. All of the above-mentioned violations were presented to the Third District Court, State of Idaho, and appealed to the Supreme Court of Idaho, who in turn declined to address the evidence and issues presented and instilled life into the invalidly enacted Comprehensive Plan, Area of City Impact Ordinance, and 1979 Canyon County Zoning Ordinance by granting equitable estoppel only to McDonnell but not to anyone else also affected by the

1. The parties involved in the Court below are: Ronald McDonnell substituted for Lee Ruwe v Canyon County Board of Commissioners.

offending ordinances--contrary to their own prior rulings--and by not permanently enjoining the County from any further interference.

The prosecuting attorney has stated that the McDonnells must return to the Planning and Zoning Commission for a conditional use permit, even though it is not a requirement under the 'C' zone the Idaho Supreme Court granted under the 1965 Zoning Ordinance.

The record was tampered with, evidence is missing, and a substitution of the maps was made.

The Idaho Supreme Court granted costs to the respondent. The Petitioner won and regained the zone that existed prior to the passage of the 1979 Zoning Ordinance, yet the Court ordered Petitioner to pay costs to respondent, and denied attorney fees. Consequently, the Petitioner is appearing pro se in this case because no further funds are available to hire an attorney, as thousands of dollars have been spent in an attempt to rectify decisions improperly made by the Planning & Zoning Commission and the Canyon County Board of Commissioners, as well as improper decisions rendered by the Courts, resulting in Petitioner's loss of the use of his property for the last 11 years.

The Petitioner respectfully prays the Supreme Court of the United States to review the procedures by which the Comprehensive Plan, Area of City Impact Ordinance, and the 1979 Zoning Ordinance which implemented the Comprehensive Plan were adopted, and the decisions of the courts; to rule on the constitutionality of the procedures followed (whether they satisfy due process); to declare the zoning ordinances null and void; and to return to the Petitioner the attorney fees and costs that have accrued since 1978, that were denied by the Idaho Supreme Court.

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THE BOARD OF COMMISSIONERS

CANYON COUNTY, IDAHO

Defendant-Respondent..

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF IDAHO
PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Ronald McDonnell, the Petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Idaho entered in the above-entitled case on August 7, 1989.

OPINIONS BELOW

Relevant decisions of the administrative agencies involved include the Resolutions and Findings of Facts issued by Planning & Zoning Commission, dated 11-23-83, and the Memorandum. Findings and Order issued by Board of County Commissioners, dated 3-9-84,denying the rezone, are annexed as Appendix A-1

and A-2, respectively. The Third District Court, Sate of Idaho, Order of Remand dated 7-9-85, returning the question to the Board of County Commissioners, is annexed as Appendix A-3. The Board of County Commissioners' Findings of Fact and Conclusions of Law issued 9-6-85, returning the question to the Third District Court for decision, is annexed as Appendix A-4. The Third District Court, State of Idaho, Judgment of Appeal from the Order of County Commissioners for Canyon County, Idaho, issued by Judge Lodge, dated 3-13-87, refusing to answer the constitutional question of due process, is annexed as Appendix A-5.

JURISDICTION

On August 7, 1989, the Idaho Supreme Court entered 1989 Opinion No. 111, written by Justice Huntley [App., D-1].

A Petition for Rehearing was filed on August 24, 1989, and Supporting Brief on September 7, 1989. On October 19, 1989, the Petition for Rehearing was denied and an Addendum on Denial of the Petition for Rehearing was filed by Mr. Justice Bistline [App. D-2].

A Remittitur was filed October 19, 1989, announcing that the August 7, 1989 Opinion was now final, and costs are allowed to Respondent, no attorney fees allowed. [App., D-3].

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Pursuant to 28 USCS 1257(3), the Petitioner, Ronald McDonnell, petitions the United States Supreme Court for a Writ of Certiorari to review a final judgment rendered by the highest state court.

STATEMENT OF THE CASE

This is an appeal from an administrative decision, a denial of rezone and conditional use permit brought by the Petitioner pursuant to Idaho Code § 67-6519, APA 67-5215 (b) through (g), and the due process clause of the 14th Amendment to the Constitution of the United States of America.

In 1970, Roy and Phillis Frank, the predecessor in interest, obtained a rezone to "C" (commercial) under the 1965 Zoning Ordinance of Canyon County, Idaho.

In 1970, Canyon County created the Canyon Development Council (CDC). The CDC prepared an elaborate book, "Planning for Canyon County," for the use and planning of land within the county. This book includes a transportation section, which recommends zone changes along highways to discourage commercial or industrial uses. "The Value of Road Planning" section states in part that road planning

> "Simplifies decisions on such matters as the upgrading of I-80 through the County... Permits the protection of future rights-of-way. Expensive developments can be kept out of them so that the future acquisition costs are not excessive."

Faced with these recommendations and knowing that the County had previously granted a zone change on this property to Roy and Phillis Frank of "C" (commercial), and knowing the Middleton Interchange was planned for this area, Canyon County in 1974 attempted to down-zone this property without sufficient notice, but ultimately the Franks (predecessor in interest) were able to have the property zoning clarified: it was indeed zoned "C" (commercial).

The Idaho Legislature passed the Local Planning Act of 1975, effective July 1, 1975 [I.C. § 67-6501 et seq] which repealed the prior Idaho Code. These statutes required that a public hearing be held by the Planning & Zoning Commission, with notice to be given fifteen (15) days prior to the hearing [App. B-2]. After the public hearing is held, if changes are made in the plan, then the statute requires that another public hearing be held, after fifteen (15) days prior notice, after which the recommendations can then be forwarded to the Board of Commissioners, who in turn must follow the same procedures as required by the statute. Canyon County Commissioners gave ten (10) days notice for their hearing, and made changes without holding another hearing before

adopting them. [Pyramid Corp v Desota County Board of Supervisors 366 F Supp. 1299 (N.D. Miss 1973)]

It is mathematically impossible for Canyon County to adopt a plan in 29 days under the statute, yet they did so. On July 29, 1975, Canyon County adopted a Comprehensive Plan by resolution, which purportedly placed Petitioners' property in an agriculture designation, inconsistent with then-existing zoning of "C" (commercial).

In December of 1976, Ronald & Phyllis McDonnell purchased the property from Roy and Phillis Frank after confirming the "C" (commercial) zone with the Canyon County Zoning Administrator.

In 1978, Ronald and Phyllis McDonnell entered into contract of sale with Lee Ruwe, at the same time entering into an agreement with Ruwe to develop the property. Justice Huntley, writing for the court in Opinion No. III, dated August 7, 1989 [App. D-1], in footnote 1 simply states that Lee Ruwe was the contract purchaser and that when the contract of sale was terminated, then McDonnell was formally substituted, instead of stating that McDonnell and Ruwe started the project in 1978.

In 1978, Lee Ruwe started land development.He took his drawings to the Planning and Zoning Commission to apply for a building permit, but was informed he must first obtain approval of the Southwest District Health Department. Percolation tests were conducted, approvals granted, construction materials purchased. When Ruwe returned for a building permit, he was informed the property now carried an A-40 (agriculture) zone because the 1979 Zoning Ordinance had changed the zone. He was informed that there were errors and oversights made in the 1979 Zoning Ordinance and they were in the process of correcting them early in 1980. When the corrections were made, it would be no problem to get the zone back, all he had to do was make an application for rezone. Planning and Zoning Administrator George Ottens drafted the letter and picked the zone he should apply for.

The first hearing on the rezone was heard by the Planning & Zoning Commission on November 2, 1983. Both Ruwe and McDonnell testified that neither had received any notice of the down-zone. Ruwe and McDonnell raised the question of how the zone could be changed without notice. [tr of P&Z hr 11-2-83 p. 5 L. 20-22, p. 7 L. 19-25, p.8 L. 1-10)[App. C-1].

The Planning & Zoning Administrator, George Ottens, stated: "Notices were not sent out to individual property owners." [tr of P&Z hr 11-2-83 p. 31, L. 21-23)[App. C-1].

On November 23, 1983, the Planning & Zoning Commission filed their resolution denying the request for rezone. The Planning & Zoning Commission did not state to the governing board, the Board of County Commissioners, that no mailed notice was given; they did, however, state in their findings as a fact, on page 4 of 5, that: (#4) "This area was rezoned to A-40 agriculture, in accordance with the Comprehensive Plan, after property notification to public" (emphasis added)[App. A-1], thus stating to the governing board that the notice given gave legal descriptions of property affected.

This denial was appealed to the Board of County Commissioners, and on January 26, 1984, the appeal was heard.

Once again, the question of improper notice to change the zone was raised. Commissioner Koch asked the Planning & Zoning Administrator if notice was sent to either Ruwe or McDonnell, the owner of record, and again it was stated that no notices were sent. (tr of Bd of Comm hr 1-26-84 p. 14) [App. C-2].

> "Commissioner Hobza asked: OK, Mr. Otten, if you saw a legal description of your property, would you know it was yours?
>
> Mr. Ottens: I would, yes.
>
> Mr. Hobza: You would consider yourself the exception to the rule, though, wouldn't you?
>
> Mr. Ottens: Possibly, yes." (tr of Bd of Comm hr 1-26-84 p. 14) [App. C-2]

After this questioning of the Planning & Zoning Administrator, George Ottens, McDonnell introduced the actual notice for the Board of County Commissioners public hearing of August 30, 1979, as it was published in the newspaper one time only, as Applicant's Exhibit #3 [App. E-1], and the actual notice (1) for the Planning & Zoning Commission public hearing of July 25, 1979, as it was published in the newspaper one time only, as Applicant's Exhibit #6 [App. E-4]. Neither of these notices gave the legal description of any properties affected, certainly not the McDonnell's, nor the names of the owners of the properties affected, nor do they state that properties will be down-zoned. McDonnell also introduced the actual notice for the Area of City

Impact Ordinance as it was actually published in the newspaper one time only as Applicant's Exhibit #4 [App. E-2]. McDonnell's property is in the area of city impact subject also to the requirements of that ordinance, which was introduced as Applicant's Exhibit #5 [App. E-3].

Regardless of the number of times this one notice each for each board is offered into evidence in this case, this is the only notice ever given. It may seem like more because of the recycling of this one notice, but the hard fact remains there was only one notice given for each meeting and it does not satisfy due process. In addition, the mailed notice required by the statute was not given.

On March 9, 1984, the Board of County Commissioners filed a Memorandum of Findings and Order. The Board did find that no direct mail notice was given because of the provision in Idaho Code which permits an "alternate form or procedure which provides adequate notice" when 200 or more property owners or residents are involved. The Board did not state how they arrived at this conclusion since Idaho Code § 67-6511 (b) requires an ordinance in lieu of mailed notice to provide adequate notice. Since no ordinance in lieu of mailed notice existed in Canyon County at that time, actual mailed notice was required but not given. Furthermore, they stated they regret the impact of the down-zone and assure that in the future that the notice will state specifically that properties are being down-zoned. The Board of County Commissioners unanimously denied the application for rezone [App. A-2].

On May 7, 1984, appeal was taken to Third District Court, State of Idaho, Canyon County.

> "(6) a statement of the issues on appeal which the appellant now intends to assert is as follows:
>
> (a) That the notice given by the defendant respondent in the down-zoning of the subject premises from "C" (commercial) under the zoning ordinance in effect in 1970 to A-40 under the zoning ordinance adopted in 1979 was not sufficient to constitute due process of the law, and such action and down-zoning is void as to the subject premises and as to the plaintiff-appellant (emphasis added).
>
> (b) That the subject premises are now unzoned or in the alternative are now zoned "C" (commercial) under the zoning ordinance in effect in 1970."[[App. C-3].

On February 22, 1985, a Motion was before Judge Roger Williams for dismissal. Judge Williams denied the Motion to Dismiss, and granted the Appellant Motion to Substitute McDonnell for Ruwe. The County wanted time to file a motion for remand, and Judge Williams stated a remand would probably be appropriate, but not just to ask some questions of McDonnell, because this case dealt with basic constitutional questions. With that the Deputy Prosecuting Attorney, George Breitsameter, replied: "That's what this motion does address." (tr on Appeal 2-22-85 p. 13 L. 6-12)[App. C-4].

Judge Williams was ready to render his decision within 7 days: he was going to render the ordinance invalid and rezone the property as "C" (commercial) because of the statutory violations and lack of notice. But Judge Williams was removed from the case, and the case was assigned to another judge.

On May 28, 1985, a Motion to Remand was before Judge Lodge, 3rd District Court. Deputy Prosecuting Attorney William A. Morrow, stated the issue:

> "But at any rate, the issue, as I understand it, the chief issue on appeal is that there was defective general notice of the passage of the 1979 Canyon County Zoning Ordinance; that is, and we are not talking about notice to a particular individual, but about a particular hearing on a particular request. We are talking about notice of the passage of the entire document and ordinance that would regulate zoning within the County. This was significant because the County had a prior zoning ordinance, as I know the Court is aware of, and that passage of a new zoning ordinance would in effect appeal the prior zoning ordinance, and so the issue, as suggested by appellant, is that because he alleges there was a defective notice of the 1979 consideration of the zoning ordinance, his prior standing, prior per the 1970 ordinance, should be the effective standing for his zoning classification for his parcel of property.
>
> Our position, the state's position, is first of all that there was a hearing before the Board of County Commissioners, the order on appeal dated June 11, 1984, sets up the appeal as an appellant proceeding as opposed to de nouveau, and further, that the APA 67-5215 does require an appellant proceeding, and does indicate the guidelines for the Court to follow in reviewing the case, and specifically with respect to the motion

by the County at this time, 67-5215 sub-small (e) provides the basis for the motion. This section indicates that a party may move for a remand for additional evidence to adduce additional evidence upon a finding of two factors by the Court:

One, that additional evidence is material to the consideration before the Court; and

Two, that the Court is satisfied that there are good reasons for failure to present the evidence at the lower proceeding.

In this particular instance, the County is requesting a remand to embellish, augment, supplement the record to adduce proof of additional type of notice that was published or transmitted through the media prior to the passage of the 1979 zoning ordinance. That, I would submit to the Court, is the very crux of the issue presented on appeal by appellant, and therefore the materiality of the request by the County should not be a question here." (tr. Remand Motion 5-28-85 p. 3 L. 4-25, p. 4 L. 1-23) [App. C-5].

Finally, Mr. Morrow states:

"However, I would note for the Court, as Mr. Breitsameter did in his motion, that neither the county nor the appellant at the Board of County Commissioners' hearing was represented by counsel. It appears to me that Mr. Breitsameter apparently in perusing or in reviewing the record, felt there was a need to supplement it with additional notice that was not presented at the Board of County Commissioners' hearing. Thus, it would appear to me that if the notice were appropriate then, the issue before the Court, rather than notice, would be one of non-conforming use of the property in question and the laws pursuant to that particular area of zoning law, decisions, or whatever, would be applicable in this particular appeal, and I think it would be a more appropriate avenue to address.

Finally, as an alternative, 67-5215 sub (f), the section that immediately follows the section we have cited for our motion, does allow or does permit proof to be adduced at the hearing on appeal if the Court determines there are irregularities that occurred in the hearing

below, and I'm not sure exactly what irregularities mean, but it would appear to me that on the type of issue presented before the Court on this appeal, that the need for a full factual background and record of the actual notices that did occur prior to the passage of the 1979 zoning ordinance would be something that the Court would want to have before it, whether on remand to the Board of County Commissioners, or whether actually heard prior to arguments in the hearing before this Court.

It would seem to me in order to make a meaningful decision and a valuable decision, the full scope of the notice would be important for the Court to consider." (tr. Remand Motion 5-28-85 p. 6 L. 25, p. 7, L. 1-25, p. 8 L. 1-8).

The Appellant resisted the remand on the grounds that I.C. § 67-6511 very specifically requires mailed notice to property owners and residents affected by a proposed zoning district boundary change, or "alternate forms or procedures which would provide adequate notice may be provided by local ordinance in lieu of mailed notice." [App. B-3].

Since it was affirmatively established that no mailed notice was given, and no ordinance in lieu of mailed notice existed, then there was no reason for a remand. The issue raised by the appellant in open court was:

"If there is no other form that the County has seen fit to set up, there is not a matter of compliance with the alternative; it's a compliance with the first requirement of the statute, the mailing of the notice. So if they don't meet the exception and they are unable to allege they do meet this exception, then there would be no point in going back to the Board of Commissioners or spend any time whatsoever in determining what the exception is or how it has been met." (tr. Remand Motion 5-28-85 p. 10 L. 13-21.)

The District Court commented:

"I would like to have seen both sides represented by counsel, because I think it is important and in the best interest of the public that the Court not make a decision that could create havoc for a lot of people and for the county by determining that the ordinance itself was unconstitutional, unless absolutely necessary. The argu-

ment that you made intrigues me about the fact that if this were sent back, and if counsel were representing the county, they could conceivably look at this as a specific case rather than generally, and maybe determine that the notice was not regular, or failed to satisfy due process requirements and grant the appellant here a conditional use permit. There may be two or three other parties that would follow but it may not disrupt the whole zoning plan. I think what I am going to do initially is to try to help the parties speed this matter along as well as perhaps handle it in the most judicious manner. I will allow the State ten days within which to supplement their brief. There is no affidavit, just their motion. By showing and demonstrating to the Court that there is in fact good reason for remanding this matter and for the county not to have raised these issues initially.

"Then I will have a pretrial conference with counsel once I have had a chance to look at that and see what is there for the purpose of possibly remanding this matter so that it may be handled individually as a request for a conditional use permit or variance rather than as a constitutional issue." (emphasis added)(tr. Remand Motion 5-28-85 p. 21 L. 3-25, p 22 L. 1-6.)[App. C-5]

Here Judge Lodge indicated that regardless of the evidence or lack of evidence offered or the arguments made by the appellant, he intends to remand to the Board of County Commissioners to get them to handle this situation on an individual basis, rather than overturn the zoning ordinance, thereby avoiding the constitutional issue and instilling life into a zoning ordinance that was invalid from its inception.

On June 7, 1985, the County filed their affidavit through George Ottens, Planning & Zoning Administrator. Attached to the affidavit prepared by the Prosecuting Attorney's office is Exhibit A. Exhibit A was copied in such a manner that the date of legal notice has been shielded from the Court. Applicants' Exhibit 3 [App. E-1] clearly shows that said purported legal notice attached to George Ottens' affidavit was not drafted until August 14, 1979, and their affidavit is false. Administrator Ottens could not legally and lawfully hand carry a Notice of the Canyon County Board of Commissioners public hearing on the proposed Canyon County Zoning Ordinance scheduled for August 30, 1979, and do so on July 16, 1979. It is not possible to hand carry a letter to KCID (exhibit B attached to Ottens' affidavit) and a letter to KIVI-TV Channel 6 (Exhibit C attached to Ottens' affi-

davit) on July 16, 1979, and have attached to that letter a legal notice which was not written until August 14, 1979, 28 days into the future. In addition, George Ottens, as the Planning & Zoning Administrator, has no function giving notice for the Board of County Commissioners. Furthermore, as of July 16, 1979, the Planning & Zoning Commission had not held their public hearing as required by I.C. § 67-6509, nor made their recommendations to the governing board as required by I.C. § 67-6509.

At the first P&Z hearing on November 2, 1983, Ottens testified he advertised on television and radio stations (tr. of P&Z hr 11-2-83, p. 31 L. 23-25)[App. C-1]; at the Board of County Commissioners hearing January 26, 1984, Ottens testified he sent notices to television Channel 6 and local radio stations (tr. of Bd. of Com. hr. 1-26-84 p. 14)[App. C-2] Now by his affidavit he swears under oath that he hand carried the notice.

Therefore the said affidavit filed by the office of Richard L. Harris, Prosecuting Attorney of Canyon County, Idaho, was a false affidavit prepared for the sole purpose of obtaining a remand to adduce additional evidence and an attempt to hide the fact that the 1979 Canyon County Zoning Ordinance is invalid because of inadequate notice to the public and to property owners [App. E-5].

On July 9, 1985, Judge Lodge entered his Order to Remand and Order Additional Evidence Before the Board of County Commissioners. The Board of County Commissioners were ordered:

> "[T]o accept additional evidence and prepare Findings of Facts and Conclusions of Law after considering the following issues:
>
> (1) What notice was given by the Canyon County Planning & Zoning Commission and the Canyon County Board of Commissioners pursuant to Idaho Code 67-6509 and 67-6511 to the public prior to the adoption of the 1979 Canyon County Zoning Ordinance.
>
> (2) Whether the notices provided to the public, as expressed in paragraph (1) for adoption of the 1979 Canyon County Zoning Ordinance complied with the notice provisions of Idaho Code 67-6509 and 67-6511." [App. A-3]

The appellant, respondent, and now the District Court all asked the same question: did the notice comply with the statute?

A Remand Hearing was held July 31, 1985. Once again the County introduced the same solitary notice for the Planning & Zoning Commission hearing of July 25, 1979, as County Remand Exhibit #1. Likewise, the one and only notice for the Board of County Commissioners hearing of August 30, 1979, was introduced as County Remand Exhibit #2. "Newly discovered" evidence, the letter to KIVI-TV Channel 6, became County Remand Exhibit #4, and the letter to KCID AM was now County Remand Exhibit #5. These are the same letters attached to George Ottens' false affidavit as exhibits "C" and "B" [App. E-5].

The County also introduced as County Remand Exhibit #3 the minutes from the Planning and Zoning Commission hearing of July 25, 1979 [App. E-6]. Finally, the County brought out some old maps (which they never unrolled) and introduced them as County Remand Exhibit #6, stating that these were the maps that were "on file" at the time of the Commission hearing of July 25, 1979. When the Petitioners went to the Board of County Commissioners the next day, however, to personally view these maps, they found maps dating from 1965 to 1974, and showing the freeway interchange drawn in black marking pen directly to Petitioner's property.

The minutes, however, reveal that there were no maps: on page 3 of said minutes, Dennis King stated "the preparation of maps, as I understand, the maps are being prepared, and zoning will occur upon the adoption of the maps, so all the land will be zoned in accordance with the Comprehensive Plan." Yet the published notice stated that the maps were "on file." [App. E-6].

The minutes further show non-compliance with Idaho Code, since changes were made to the proposed ordinance with no further public hearings being held to hear testimony on the changes [App. E-6].

Then when this case was appealed to the Idaho Supreme Court and the record was ready for transmittal, these same maps (County Remand Exhibit #6) had been removed from the Court record by the Prosecuting Attorney and the Planning & Zoning Administrator. Petitioner filed objections and a request for corrections and additions to the Clerk's Record August 21, 1987 [App. E-7]. Court minutes filed September 8, 1987, show the Court instructed the Clerk to try to locate the County Remand

Exhibit #6 maps, and transmit them to the Idaho Supreme Court [App. E-8]. On October 15, 1987, the Clerk wrote a letter to Frederick C. Lyons, Clerk of the Supreme Court, stating that the maps are the original maps used in the Planning and Zoning Commission office, that they would allow them out of the office for one hour for duplication, but that there were no copies existing "because of the economic problem in having that done." (App. E-9.) Petitioner filed a Motion on October 27, 1987, to compel the Third District Court Clerk, the Canyon County Board of Commissioners, and the Canyon County Planning and Zoning Commission to produce the maps that had been admitted into evidence at the Remand Hearing July 31, 1985, [App. E-10]. Accompanying this Motion was a supporting affidavit signed by Petitioner Ronald McDonnell, stating the maps now on the wall in the Planning & Zoning office and dated September 6, 1979, are not the same maps introduced into evidence as County Remand Exhibit #6 which, when viewed by the Petitioners in the County Commissioners office had shown the freeway interchange directly to his property [App. E-11]. Again December 23, 1987, Petitioner filed a Motion to have the maps admitted into evidence sent to the Idaho Supreme Court.

On January 14, 1988, Third District Court Deputy Clerk M. Macho sent maps to the Idaho Supreme Court, stating that they had been found, and were the the original maps used in the hearing, and now the record was complete [App. E-12]. On January 18, 1988, the Clerk of the Supreme Court issued an Order Granting Motion to Augment Appeal Record [App. E-13]. On February 23, 1988, the Petitioner again made a Motion to Augment the Record, stating that the maps submitted to the Idaho Supreme Court were not the same maps that had been originally admitted into evidence [App. E-14]. That Motion was denied on March 31, 1988, by the Idaho Supreme Court [App. E-15].

In summary, the evidence (County Remand Exhibit #6) was initially missing from the Court records. Other maps were later substituted, and on June 26, 1989, the Deputy Prosecuting Attorney made a motion to release the Exhibit #6 maps from the Idaho Supreme Court records [App. E-16]. An objection was duly filed by the Appellant on the basis that the maps are only rough draft drawings, not dated, and in no way were "zoning maps." The Idaho Supreme Court did release said maps to Canyon County for copying, but to date they have not been returned to the Idaho Supreme Court [App. E-17].

The minutes of the Planning and Zoning Commission hearing of July 25, 1979 (County Remand Exhibit #3) clearly state that no maps existed at the time of the hearing (they were "being prepared"), but that when the maps are prepared, "zoning will occur upon the adoption of the maps." The Petitioner believes that the maps introduced into evidence and the substitution and subsequent disappearance of the maps were an attempt to cover up the fact that Canyon County did not comply with any requirement mandated by the legislatures in the Local Planning Act of 1975 (I.C. 67-6501 et seq).

The Board of County Commissioners were aware that the ordinances were passed with procedural defects, because in 1980 they held a hearing (without notice to the public) and passed an ordinance to correct oversights in the 1979 Zoning Ordinance. Dick Winder, a member of the Planning and Zoning Commission at that time, testified at this hearing that the Commission hadn't done its job when they passed the 1979 Zoning Ordinance. [App. E-18.] Winder said they didn't have the maps, and they acted hastily to get a new zoning ordinance passed in 120 days because of a moratorium imposed in May 1979 by the County Commissioners on all planning and zoning activity because they knew the 1965 zoning ordinance was invalid.

In 1985, Winder, then Chairman of the Planning and Zoning Commission, testified at the Remand Hearing of July 31, 1985, that he had known the Board of County Commissioners were down-zoning without telling anybody. (tr Remand hr 7-31-85 p. 120 L. 13-25 p. 121 L. 1-2)[App. E-19.] The evidence at the Remand Hearing on July 31, 1985, proved that the plan and ordinances were passed in violation of Idaho Codes.

Del Hobza testified that the Commissioners could adopt any ordinance they want, in any manner they want, because no one would be able to afford to challenge their actions through the court system. (Minutes of the Planning and Zoning Commission hearing of 7-25-79 p. 4)[App. E-6].

With all of this overwhelming evidence, the Board of County Commissioners entered their Findings of Facts and Conclusions of Law on September 6, 1985.

They found as a fact::

> "35. As to the McDonnells' property, in particular, the notices provided prior to adoption of the Ordinance were not adequate in that they, when read in conjunction

with the information provided by the County Planning and Zoning office regarding the C zoning of the property, were not sufficiently specific to warn the interested persons identified in these Findings that the McDonnell property might be affected by down-zoning unless they appeared and voiced objections to the contents of the proposed Ordinance.

36. The notices as they regard the McDonnells' property, considered together with the reliance placed upon advice from the County Planning and Zoning office, did not comply with the notice provisions of Idaho Code, section 67-6509 and 67-6511." (Findings of Fact and Conclusions of Law, p 7) [App. A-4].

The following conclusions of law were made:

"4. The notices provided, when considered together with the reliance placed by persons interested in the ownership of the McDonnells' property upon advice given by the County Planning and Zoning office, did not specifically warn these interested persons that the property might be affected by down-zoning unless they appeared and voiced objections to the contents of the proposed Ordinance." (See American Oil Corp. v. City of Chicago, 331 N.E. 2d 67 (Ill. App. 1975); Midway Protective League v. City of Dallas, 552 S.W. 2d 170 (Tex. 1977).

5. The notices, therefore, when considered together with the reliance placed upon the advice given by the County Planning and Zoning office, did not comply with the provisions of Idaho Code, section 67-6509 and 67-6511 as to the McDonnells' property. (Findings of Fact and Conclusions of Law, p 7-8) [App. A-4].

This record, minus the maps, were then forwarded to the Third District Court, Judge Lodge, for oral argument and decision. Oral arguments were heard March 7, 1986.

The Appellant once again stated inadequate notice was given. "These notices are jurisdictional. The ordinance stands or falls on the effect of a notice." (tr. Appeal 3-7-86 p. 14 L. 11-12)[App. C-6].

The Third District Court ruled equitable estoppel applied in favor of the appellant, and ruled a no-zone, but a year and 5 days later,

on March 12, 1987, the Court entered the following order:

> "(1) That neither the constitutionality of Idaho Code Sections 67-6509 and 67-6511 nor the constitutional sufficiency of the notices referred to in paragraph 2 and 3 below are before the Court and the Court makes no decision thereon.
>
> (2) That the public notices given by Canyon County Planning and Zoning Commission prior to its adoption of the 1979 Canyon County Zoning Ordinance complied with the notice provisions of Idaho Code section 67-6509 and 67-6511.
>
> (3) That the public notices given by the Board of Commissioners of Canyon County, Idaho, prior to its adoption of the 1979 Canyon County Zoning Ordinance complied with the notice provisions of Idaho Code Sections 67-6509 and 67-6511." [App. A-5]

Judge Lodge's order is so worded that paragraphs (2) and (3) when taken separately or out of context appear to say precisely the opposite of what they say when taken in context:

> "That neither the constitutionality of Idaho Code Sections 67-6509 and 67-6511 nor the constitutional sufficiency of the notices referred to in paragraph 2, i.e.: That the public notices given by Canyon County Planning and Zoning Commission prior to its adoption of the 1979 Canyon County Zoning Ordinance complied with the notice provisions of Idaho Code section 67-6509 and 67-6511 and paragraph 3 i.e. That the public notices given by the Board of Commissioners of Canyon County, Idaho, prior to its adoption of 1979 Canyon County Zoning Ordinance complied with the notice provisions of Idaho Code Sections 67-6509 and 67-6511 are before the Court and the Court makes no decision thereon." (emphasis added

The constitutionality of Idaho Code §§ 67-6509 and 67-6511 was never an issue; instead, the Appellant has relied on the Local Planning Act and Idaho Codes §§ 67-6509 and 67-6511 for their contention that Canyon County did not comply with the Code in any particular to enact the Comprehensive Plan, the Area of City Impact Ordinance, and the 1979 Canyon County Zoning Ordinance.

Constitutional sufficiency of the notice was indeed the very issue from the beginning: that the notice given was not sufficient to satisfy due process.

The Court remanded for a full evidentiary hearing for the issue of whether the notice complied with the code. The Board of County Commissioners ruled that the notice was not sufficient as to the McDonnells' and did not comply with I.C. §§ 67-6509 & 67-6511. This Court overruled the Commissioners in violation of APA 67-5215 (g).

The order goes on to say:

> "4. That under the facts and circumstances of this case, equitable estoppel as found by the Board of County Commissioners for Canyon County applies in favor of the plaintiff Ronald McDonnell." [App. A-5]

The Judge has not addressed the constitutional issue and has granted estoppel, continuing an invalid zoning ordinance completely contrary to case law.

Next the Order states:

> "5. That the subject premises are given a classification of C2 under the Canyon County Zoning Ordinance approved and adopted on the date of September 6, 1979, which zoning classification is substantially the same as the prior zoning classification of C under the Canyon County Zoning Ordinance approved and adopted on the date of January 11, 1965." [App. A-5]

And so to review this order: •The constitutionality of notice, which was the issue from the beginning—the very issue deemed by the Court to be the issue—was not addressed. •Equitable estoppel was granted so that Canyon County cannot enforce the 1979 Canyon County Zoning Ordinance on the McDonnells in most jurisdictions. No injunction was issued to prevent the same thing happening again. •Yet a zone of C-2 was granted under the invalid 1979 Canyon County Zoning Ordinance.

This decision was then appealed to Idaho Supreme Court. The basis for the appeal was:

I.

THE COURT ERRED IN RAISING SUBSTANTIVE ISSUE IN A PROCEDURAL CASE.

This is a procedural case--i.e., were the plan, ordinance, and area of city impact properly enacted according to the statutes?--rather than a substantive issue--what is the best use of the land? Separation of powers, the Court cannot make a zone; that is solely the function of the Planning and Zoning Commission and the Board of County Commissioners. The property carried a "C" zone under the 1965 Zoning Ordinance. The County arbitrarily and without proper notice changed the zone to A-40 (agriculture) in 1979. The Court cannot change the zone to C-2 under the invalid zoning ordinance.

Justice Huntley, writing for the Court in Opinion III, dated August 7, 1989 [App. D-1], states that McDonnell appealed the district cout decision asserting that the district court may have intended to place him in the position he was in prior to the enactment of the 1979 Zoning Ordinance, but that the order failed. What Petitioner actually asserted in his appeal was that the 1979 Zoning Ordinance was void and that a violation of due process had occurred.

> "This judicial function does not include the legislative function of determining the appropriate land use and assigning a specific zoning category to the subject property. Assumption of that function would make the courts the ultimate planning commission performing legislative acts. Clearly, such approach is inappropriate. Nothing in this division of powers, however, disables the courts form enjoining enforcement of a void zoning." [Garrett v. City of Oklahoma City 590 P. 2d 1195, 1197 (Okla. Appeals 1979)]

II.

EQUITABLE ESTOPPEL WILL NOT LIE IN AN INVALID ZONING ISSUE SUCH AS THAT BEFORE THE COURT.

The Idaho Supreme Court has ruled that the doctrine of equitable estoppel does not lie in Harrell v City of Lewiston, 506 P.2d 470, 95 Id. 243. Hubbard v. Canyon County Commissioners 106 Idaho 436, 680 P.2d 537.

Justice Huntley, writing for the Court in Opinion III, dated August 7, 1989 [App. D-1], states that: "Since the district court's

finding of equitable estoppel has not been questioned on appeal, we are not called upon to consider the application of our prior decision in Harrell v. City of Lewiston, 95 Idaho 243, 506 P.2d 470 (1973), and we do not rule upon whether equitable estoppel can appropriately be applied in future cases of this nature."

The Idaho Supreme Court's finding that equitable estoppel was not questioned on appeal is erroneous: McDonnell did appeal the districtcourt's decision, although Canyon County did not.

Furthermore, the Local Planning Act of 1975 § 67-6501 et seq. effective July 1, 1975, includes I.C. § 67-6514:

> **"Existing zoning or subdivision ordinances.**--A governing board, using any zoning or subdivision ordinance in existence on the effective date of this chapter, shall conduct a review of those ordinances and shall make necessary amendments in accordance with this chapter prior to January 1, 1978, following notice and hearing pursuant to section 67-6509, Idaho Code." [I.C. §67-6514, as added by 1975, ch 188 2 p. 515.][App. B-4]

Canyon County had a zoning ordinance in effect on the date this statute was made law. They were required to amend the zoning ordinance and bring it into accordance with their adopted plan. The Idaho Supreme Court in Gumprecht v. City of Coeur D'Alene, set out the procedures for hearings prior to the recommendation, adoption, or amendment of a plan or ordinance. § 67-6509 and I.C. § 67-6511 (a)-(c) (App. B-2 and B-3).

> "Finally, in I.C. §6509 (a), the legislature specifically mandated that no plan shall be effective unless adopted by resolution or ordinance by the governing board." (Court emphasis.) I.C. §67-6511 required each governing board "by ordinance, adopted, amended, or repealed in accordance with the notice and hearing procedures..." established in I.C. §67-6509 to establish zones or zoning districts within its jurisdiction." Gumprecht v. City of Coeur D'Alene, 104 Id 615, 661 P.2d 1214 (1983).

This required Canyon County to adopt a plan, to amend the existing zoning ordinance, and to give notice and hold hearings, and in case of a district boundary change to give further notice by mail or pass an ordinance in lieu of mailed notice. Since it has been affirmatively established that no mailed notice was given, and no ordinance in lieu of mailed notice exists, then Canyon County is clearly in violation of the statute.

Even though the issues were raised by the Appellant, fully briefed and argued, the Respondent Canyon County did not address the issues raised.

THE RULINGS BELOW

First of all, in the oral arguments heard by the Court on September 14, 1988, Chief Justice Sheppard, and Justices Huntley, Bakes, Johnson, sat with retired Justice McFadden.

Idaho Supreme Court on December 21, 1988, dismissed the case as premature under the exhaustion of remedies theory. So they were sidestepping the constitutional question raised throughout the entire proceeding and also raised but not answered by the District Court. The reason for dismissal was that the appellant had not asked for a conditional use permit under the C2 zone assigned by the Judge in violation of separation of powers, granted equitable estoppel and turned around and placed the property into the very ordinance the County was supposed to be estopped from enforcing.

A petition for rehearing was duly filed and granted and briefing the issues resumed.

This case is really not complicated, but the active part of the Courts in sidestepping the constitutional issue presented can be demonstrated by the transcript of oral arguments before the Supreme Court of Idaho on April 12, 1989. Sitting on the Court this time were Chief Justice Sheppard, Justices Huntley, Bakes, Johnson, and Bistline. The Justices specifically addressed the due process issue. (tr. of oral argument p. 26 L. 18-25, p. 27 L. 1-25, p. 28 L. 1-25, p. 29 L. 1)[App. C-7]. The appellant specifically addressed the constitutional issue (tr of oral argument p. 7 L. 23-25, p. 8 L. 1-25, p. 9 L. 1-6, p. 10 L. 3-13, p. 11 L. 13, p. 12 L. 1-4, p. 15 L. 18-21)[App. C-7].

Additionally, at oral argument, the respondent's attorney, Deputy Prosecuting Attorney Charles A. Saari, openly stated in court that an open public hearing was held the day before this oral argument was heard, without notice to McDonnells or their attorney, and that the Board of Commissioners would grant a conditional use permit under the C-2 zone (under the 1979 zoning ordinance[2]) after a public hearing. Saari even went so far as to introduce the Commissioners to the Idaho Supreme Court and stated

2. Which the Petitioner contends is invalid

they would affirm before the Court that they would grant a conditional use permit. Chief Justice Sheppard quickly stated this Court was not a fact-finding Court and that they would hear no witnesses. The fact that this meeting had been held illegally is never mentioned, however, in the Court's opinion, perhaps because of Chief Justice Sheppard's untimely death. (tr of oral arguments 4-12-89 p. 16 L 3-25, p. 17 L 1-25, p. 18 L. 1-25, p. 19 L 1-25)[App. C-7].

On August 7, 1989, the Idaho Supreme Court withdrew the December 21, 1988 opinion and submitted Opinion No. 111 [App. D-1].

Mr. Justice Huntley resigned effective August 7, 1989, but rendered this opinion before the effective date of his resignation. Justice Huntley's writing for the Court has some errors, one being the statement in footnote 2 that a building permit was requested and denied and never appealed. This is an incorrect statement. The Idaho Supreme Court upheld the judgment of the District Court but with one modification: this Court granted the "C" zone the appellant originally had under the 1965 Zoning Ordinance. The appellant won, regaining the commercial zoning—albeit for the wrong reason—after 11 years, yet the Court denied attorney fees and ordered the appellant McDonnell to pay costs to Canyon County. The attorney fees amounted to an insurmountable economic penalty incurred by the Petitioner in an attempt to rectify decisions improperly made by the Planning & Zoning Commission and by the Canyon County Board of Commissioners. [App. D-1]

A petition for rehearing was duly filed on August 24, 1989, to petition the Idaho Supreme Court to address the issues presented. On October 19, 1989, the Idaho Supreme Court issued a denial of the petition to grant a rehearing with on opinion written by Justice Bistline, stating:

> "Both parties and the district court in this case have properly brought an issue to the attention of this Court that deserves review.
>
> Both parties have presented this Court with the same constitutional question, yet we have declined to address it." [App. D-2]

A Remittitur was filed October 19, 1989, declaring the August 7, 1989 opinion is final. [App. D-3].

REASONS FOR GRANTING THE WRIT

In the case of Gumprecht v. City of Coeur D'Alene, 104 Id. 615, 661 P.2d 1214 (1983), the Idaho Supreme Court ruled the method for adopting and amending a plan and ordinance, I.C. § 67-6509 and I.C. § 67-6511 (a)-(c), were to be strictly complied with.

The Idaho Supreme Court overlooked this prior ruling even though it was briefed and argued except for one Justice. Justice Johnson in his concurring opinion stated

> "While the 1979 zoning ordinance was styled as a new zoning of Canyon County, in fact, it was only an amendment of the 1965 ordinance. I.C. § 67-6511 (b) (1975) provides that when the amendment of a zoning ordinance changes a zoning district boundary, 'notice shall be provided by mail to property owners and residents within the land being considered.' This notice was not given, and the ordinance was therefore not valid to change the zoning of McDonnell's property from commercial to agricultural." (1989 Opinion No. 111 8-7-89)[App. D-1]

Not only was the Idaho Supreme Court ruling inconsistent with their own prior ruling on this issue, but it was also inconsistent with the United States Supreme Court in several cases:

> "It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint." Mullane v Central Hanover Bank and

Trust Company, 339 US 306, 315 (1950).

And most recently, Tulsa Professional Collection Services v Pope citing Mullane and Mennonite: if the appellant's name and address are known, mailed notice is inexpensive, efficient, and reasonably calculated to provide actual notice. Certainly the name and address was known and Planning & Zoning Administrator George Ottens stated in the very first hearing that the assessor's roll carried Mr. McDonnell as the record owner of the property. The statute I.C. § 67-6511 (b) clearly required actual mailed notice, as no ordinance in lieu of mailed notice exists, and if this requirement is ignored as it has been by every court so far, then certainly the one and only notice given in the back pages of a newspaper gives no identification of what properties are being changed, no legal descriptions were given, no names, and certainly no statement that zones established under the prior zoning ordinance would be changed, not even a statement that the governing board would pass the proposed ordinance. The notice was a farce.

> "If appellant's identity as a creditor was known or 'reasonably ascertainable' by appellee (a fact which cannot be determined from the present record), the Due Process Clause of the Fourteenth Amendment, as interpreted by *Mullane* and *Mennonite*, requires that appellant be given notice by mail or such other means as is certain to ensure actual notice. Appellant's claim is properly considered a property interest protected by the Clause." Tulsa Professional Collection Services v Pope 108 S.Ct. 1340 (1988) 1341."

Another issue raised by appellant in Idaho Supreme Court was:

THE COURT ERRED IN DECLINING TO RULE ON WHETHER OR NOT THE APPELLANT HAD BEEN DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

The arguments all hinged on the fact that notice is jurisdictional. Local government has no power to zone, but derives this power from the legislatures. It is mandatory that the statute be strictly complied with.

> "Regardless of the type of notice called for by the statute, the basic requirement that notice be given is uniformly held to impose upon the zoning authority a mandatory duty to give it, indefault of which jurisdiction to

pass valid zoning measure is lacking. The rule that compliance with the statute is mandatory and jurisdictional has been announced in scores of cases and appears to prevail in every jurisdiction where the question has been presented. It is founded on the premise that local government, having no residual power to zone, is absolutely incapable of doing so except in the manner prescribed in the statute." Annot. 96 A.L.R. 2nd 449 at 445.

The Idaho Supreme Court has reaffirmed and stated that the judiciary has an obligation to reverse conclusions and decisions which are in violation of the Constitution.

> "Our review of agency procedings is limited; the reviewing court cannot "substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." I.C. 67-5215 (g)(supp.1987). The court is obliged, however, to reverse a decision if substantial rights of an individual have been prejudiced because of the administrative findings, inferences, conclusions, or decisions are "in violation of constitutional or statutory provisions." Id.: (citing Allen v. Lewis-Clark State College 105 Id. 447, 452, 670 P.2d 854, 859 (1983). H & V Engineering Inc. et. al v. Idaho State Board of Professional Engineers and Land Surveyors 747 P.2d 55, 113 Id. 646 (1988).

The District Court overruled the Board of County Commissioners facts and conclusions that the notice did not comply with the statute as to McDonnells, which is a violation APA 67-5215 (g).

The Idaho Supreme Court decided this case which involves the federal question of due process in violation of the 14th Amendment to the Constitution in conflict with other State Court decisions and a Federal Court of Appeals decision.

Hart v. Bayless, an Arizona State Supreme Court case which has been followed by Arizona and recognized in Idaho in Citizens for Better Government v. County of Valley, 95 Id 320 at 321:

> "Where both plaintiff and defendants had asked for adjudication of question whether either of county zoning ordinance was valid Supreme Court would resolve the question without considering the issue of standing of plaintiff to challenge the validity of such ordinances.

> "Where there is no factual evidence presented to show that a county ordinance was not properly adopted, such ordinance is entitled to presumption of regularity which attaches to all official acts, but where facts are shown which rebut that presumption, courts will exercise their jurisdiction to determine whether the necessary statutory prerequisites have been complied with." (emphasis added). Hart v. Bayless Investment & Trading Company, 346 P.2d 1101 at 1102.

The plaintiff/appellant and the defendant/respondent both asked for this question to be answered. District Court Judge Lodge deemed what notice was given and whether is complied with the code to be the issue, yet the District Court declined to address the constitutional issue as well as the Idaho Supreme Court. These actions are in conflict with other state court of last resort rulings.

The 10th Circuit, United States Court of Appeals, has also decided the case of Carter v. City of Salina in favor of Carter. Even though fully aware of this decision, the Idaho Supreme Court decided this case in conflict with a Federal Court of Appeals ruling.

> "It is the general rule that zoning ordinances are in derogation of common-law property rights and find their authority through the state police power; accordingly, municipalities and other political subdivisions must scrupulously comply with statutory requirements, including notice and hearing, in order to provide due process of law. *Melville v. Salt Lake County*, 536 P.2d 133 (Utah. 1975); *Tolman v. Salt Lake County*, 20 Utah 2d 310, 437 P.2d 442 (1968); 101A, C.J.S., Zoning and Land §§ 12, 13; 56 Am.Jur.2d, Municipal Corporations, § 346; 82 Am.Jur.2d, Zoning and Planning, §§ 49, 50, 51; R. Anderson, 1 American Law of Zoning, § 4.11 (2d Ed. 1976); 7 Rohan, Zoning and Land Use Controls, § 50.01(1)(a); Rathkopf, The Law of Zoning and Planning, Vol. 1 § 2.02(2); Powell on Real Property, Vol. 6, § 871.6(3)(due process requirements to non-residents relative to zoning notices and procedures); Annot., 96 A.L.R.2d 449, 445. Ordinances which fail to comply with the state enabling statutes requiring notice and hearing are *void. Melville v. Salt Lake County, supra; Tolman v. Salt Lake County, supra; Theobald v. Board of County Com'rs, Summit County*, 644 P.2d 942 (Colo. 1982); *Hallmark Builders and Realty v. City of Gunnison*, 650 P.2d 556 (Colo. 1982); *McIntyre v. Mohave County*, 127 Ariz., 317, 620 P.2d 696 (1980);

Morland Development Co., Inc. v. City of Tulsa, 596 P.2d 1255 (Okl. 1979); *Schoeller v. Board of County Com'rs of Park County*, 568 P.2d 869 (Wyo.1977); *State ex rel. Christian, Spring, Sielbach and Associates v. Miller*, 169 Mont. 242, 545 P.2d 660 (1976). Noncompliance with statutory requirements relating to notices and hearings are procedural defects jurisdictional in nature. Such procedural infirmities cannot be overlooked and the fact that such an ordinance has been "on the books" and in effect for a long period of time does not instill life into an ordinance which was void at its inception. Such an ordinance is of no effect. In *Nesbit v. City of Albuquerque*, 91 N.M. 455, 575 P.2d 1340 (1977) the court held that by failing to follow statutory procedures in the promulgation of zoning ordinances, due process was violated and no subsequent act could correct the defect. *See also Miller v. City of Albuquerque*, 89 N.M. 503, 554 P.2d 665 (1976); *Glaspey & Sons, Inc. v. Conrad*, 83 Wash.2d 707, 521 P.2d 1173 (1974); *Pyramid Corp. v. DeSoto County Board of Supervisors*, 366 F.Supp. 1299 (N.D.Miss. 1973); *Bowling Green-Warren County Airport Bd. v. Long*, 364 S.W.2d 167 (Ky.1963) (A void ordinance for want of compliance with requisite statutory requirements as to notice and public hearing entitles the property owners within the alleged zone to use their property as they see fit); *Hart v. Bayless Investment & Trading Company*, 86 Ariz. 379, 346 P.2d 1101 (1960) (The failure to comply with jurisdictional notice and hearing conditions of the Zoning Act rendered the subject zoning ordinances void and did not limit the use of their property by property owners within the alleged zoned areas)." Carter v. City of Salina, 773 F.2d 251, 254 (1985).

If the zoning ordinance is void for want of the procedural safeguards of notice and hearing, etc., the properties intended to be affected thereby are unzoned and the property owners may proceed with any other lawfully intended use. In such cases, the court is limited to the remedy of declaring the zoning ordinance void and finding that the property owner affected is entitled to use his property for any lawful purpose without regard to the void zoning ordinance. Id p. 255.

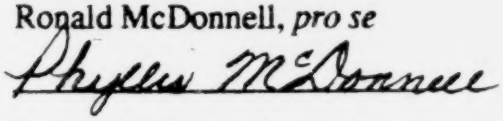
No public purpose was stated by Canyon County for down-zoning the Petitioner's property from "C" (commercial) to agricultural. Recently in Nollan v. California Coastal Commission 107 S.Ct. 3141 (1987) the United States Supreme Court recognized the vested right to build and stated that a public purpose must be stated for the County to be able to exercise their police power. The County clearly intended to keep the area free from construction because of the planned freeway interchange and the method chosen was the down-zoning through the invalid 1979 Zoning Ordinance.

CONCLUSION

Wherefore, Petitioner respectfully prays that a Writ of Certiorari be granted to have the United States Supreme Court answer the federal question of due process presented by both the Petitioner and by Canyon County, the Respondent, and deemed by the Third District Court to be the issue.

Respectfully submitted,

Ronald McDonnell, *pro se*



Phyllis McDonnell, *pro se*

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OPINIONS BELOW

1. Resolution and Findings of Facts, issued by Planning & Zoning Commission 11-23-83.

Resolution of the Canyon County Planning & Zoning Commission. Whereas: An application by Mr. Lee Ruwe for the rezoning of approximately 5 acres more or less from A-40 Agricultural to R-2T (Mobile Home Residential Zone) together with a Conditional Use Permit, to allow for the developing of a Mobile Home Park. Located on the North side of Karcher Road (Highway 55), approximately 1000 feet West of Middleton Road, was heard by this Commission at a legally advertised Public Hearing, November 2, 1983.

Whereas: Mr. Lee Ruwe, contract purchaser of the above-mentioned 5 acres from Ronald McDonell [sic], who is the recorded owner of said land, presented testimony on behalf of the application as well as Ronald McDonell [sic].

1. Mr. McDonell [sic] stated the property was purchased in 1978 with the intentions to develop it as a Mobile Home Park.

2. Property was zoned at that time to allow for a Mobile Home Park.

3. Percolation tests for appropriate sewage dispersement were approved in 1978 by the Southwest District Health Department for a Mobile Home Park.

4. Sewage system would be a central, septic tank with an elevated drainfield system.

5. Domestic water system would be a central system.

6. Mobile Home Park would be for adults only with no children allowed.

Mr. Ron McDonell [sic] stated he purchased the property as Commercial property and sold it to Mr. Ruwe in 1978 on contract.

Whereas: The following persons presented testimony in opposition to the application:

Appendix A

A statement prepared by Mr. William F. Yost, Attorney representing Mr. & Mrs. Harry Kniggie and other concerned property owners in adjacent subdivisions, raised the following objections to the application:

1. A 35 unit Mobile Home Park at this location would increase the already existing traffic and congestion on Karcher Road.

2. The Karcher Acres Subdivision adjacent to this request has been developed as single family residential on one acre lots.

3. Increased traffic hazard in this area with regards to school children being transported to and from school.

4. Adjacent property owners are concerned with the development of the applicants Mobile Home Park and the ultimate detriment to their property.

5. High water table in the immediate area; six (6) feet deep irrigation wells are not uncommon in the Karcher Acres Subdivision.

Mr. John Rogers, an adjacent land owner in the Karcher Acres Subdivision, stated he felt that his property would be devaluated if a Mobile Home Park was allowed and he was also concerned with the high water table.

Mrs. Jeanette Scott, a resident of the Karcher Acres Subdivision, stated she was concerned with the increase in the number of accidents at Karcher Road and Middleton Road and that the desired Mobile Home Park would add to this. That she has talked to other Mobile Home Park operators in the area and there are many vacant mobile home spaces available. She is also concerned with pollution of the Elijah Drain as well as the fact that there is a record of drainfield problems in the immediate area.

Mr. Jim Gutches, joint land owner of 150 acres South of Karcher Road, does not necessarily object to this development, but he is concerned with the quality and covenants for the proposed Mobile Home Park.

Mr. William Augsberger, a resident of the Karcher Acres Subdivision, stated he is opposed due to traffic by adding another 50 to 60 cars entering the highway at this point. The

speed limit at this location is 55 m.p.h., and poor sight distance up to Middleton Road.

Mrs. Spears, a resident of the Karcher Acres Subdivision, stated she is concerned with kids shooting in open fields, septic tanks in the area, high water table which she feels would occur if the proposed Mobile Home Park is developed.

Mr. Darwin Feller, land owner South of Karcher Road, is concerned with traffic safety and the possible contamination of the water in the area by sewage generated by the proposed Mobile Home Park.

Mr. Ken Fish, adjacent land owner, is concerned with the devaluation of his property if the application is approved.

Whereas: Based upon the testimony, questions and discussion during the hearing, this Commission makes the following FINDINGS OF FACT:

1. This parcel was rezoned to "C" Commercial in 1970 for the development of a Mobile Home Park by Mr. Roy Frank which was never developed.

2. Mr. Ronald McDonell [sic] purchased the land in 1978 as Commercial property, which was then sold to Mr. Lee Ruwe on contract; this contract was not recorded.

3. The entire unincorporated area of Canyon County was rezoned in 1979 in accordance with the Local Planning Act of 1975.

4. This area was rezoned as A-40 Agriculture in accordance with the Comprehensive Plan, after property notification to public.

5. Mr. Ruwe's application for a rezoning from A-40 Agricultural to R-2T together with a Conditional Use Permit to develop a Mobile Home Park was submitted August 31, 1983.

6. Canyon County Zoning Ordinance, Section 1.9, 2a, require Mobile Home Parks in a R-2T zone with a Conditional Use Permit.

7. Canyon County and City of Nampa Impact Area Ordinance require Mobile Home Parks to be designed in accordance with City of Nampa Mobile Home Park Ordinance.

8. A legally advertised Public Hearing was held November 2, 1983.

9. The speed limit at this location is 55 m.p.h.

10. Traffic at this location is 5300 vehicles per day (24 hours) as related to the Canyon County Planning and Zoning Administrator by the Idaho State Department of Transportation.

11. Middleton Road, approximately 300 yards to this (sic) East, is a high accident area.

12. Sight distance at this area is poor with regards to the 55 m.p.h. speed limit and the number of vehicles traveling on Karcher Road (Highway 55).

13. The configuration of this triangular parcel of land, bounded by the Elijah Drain on the North, is not conducive to high density development.

14. Mobile Home Parks within Nampa and vicinity have available vacant spaces.

15. There is a high failure rate for drainfields in this immediate area.

16. Mr. Ruwe's request is beyond the City of Nampa sewer and water service area.

Based upon the testimony and discussion at the Public Hearing, the Canyon County Planning and Zoning Commission recommends to the Board of County Commissioners that the request by Mr. Lee Ruwe to rezone approximately 5 acres more or less from A-40 Agricultural to R-2T (Mobile Home Residential Zone) together with a Conditional Use Permit, to allow for the developing of a Mobile Home Park, located on the North side of Karcher Road (Highway 55), approximately 1000 feet West of Middleton Road, be denied.

Dated this 23rd day of November, 1983.

Signed: Julie Hyslop, Chairman
Planning and Zoning Commission

Attest: Sumner Johnson, Secretary
Planning and Zoning Commission

This resolution was approved by the Canyon County Planning and Zoning Commission on November 16, 1983.

CERTIFICATE OF MAILING:

I hereby certify that on this 29th day of November 1983, I served a true and correct copy of the Resolution by the Canyon County Planning and Zoning Commission dated November 23, 1983, to:
Lee Ruwe
3055 N. Eagle Road
Meridian, Idaho 83642
by depositing a copy thereof in the United States mail, first class postage prepaid.
Lori Walker, Secretary
Planning and Zoning Commission
Copy delivered to Mr. William Yost January 19, 1984 by Lori Walker.

2. Memorandum, Findings and Order, issued by Board of County Commissioners 3-9-84.

BEFORE THE CANYON COUNTY BOARD OF COMMISSIONERS

IN THE MATTER OF THE APPLICATION
BY LEE RUWE SEEKING A RE-ZONE OF 5 ACRES FROM A-40 TO R-2T AND A CONDITIONAL USE PERMIT FOR THE SAME FIVE (5) ACRES

MEMORANDUM OF FINDINGS & ORDER

The Board has decided to reduce its Findings to memorandum form in this matter, and adopts this memorandum as its formal Findings.

Lee Ruwe has filed with the Canyon County Planning and Zoning Administrator an application for re-zone of a 5 acre parcel from A-40 to R-2T. The parcel is located on the north side of Karcher Road about 1,000 feet west of Middleton Road.

In 1970, upon application by Roy Frank, the parcel in question was re-zoned "C" (Commercial) to facilitate development of a mobile home park. In 1978 Ronald McDonnel [sic] purchased the land, still zoned Commercial, and then sold it to Lee Ruwe under a land sale contract.

In 1979, the County notified County residents by newspaper advertising (the legal notice) and other media news coverage that a new zoning ordinance was being considered along with adoption of a County comprehensive zoning plan, and that public hearings would be held on the ordinance and plan. No direct mail notice of the public hearings was sent because of the provisions of the Idaho Local Planning Act of 1975, section 67-6511, which permit notice by "alternate forms or procedures which provide adequate notice" when 200 or more property owners or residents are involved.

In notifying County residents and property owners of the hearings scheduled for consideration of the plan and ordinance, the County utilized the procedures provided by section 67-6509, Idaho Code, which pertain to adoption of a comprehensive plan: Legal notices, together with other media releases which advised of the hearings. Even though the legislature did not define "adequate notice" in section 67-6511, the Board finds that notice meeting the requirements of section 67-6509 which was passed simultaneously with 67-6511 would meet the statutory requirements as to <u>form</u> of notice. The Board finds, therefore that form or means used to advertise and notify property owners and residents of the hearings was adequate.

The Board has reviewed the contents of the legal notices offered in evidence by the applicant, and finds that they also provided adequate notice as to their <u>content</u>. The Board finds that the notices were sufficently specific to reasonably inform property owners and residents that their property was subject to zone change because the notices pointed out that the proposed ordinance would deal with "the dividing of County into zones", "governing the use of land for residential and nonresidential purposes", and "prescribing procedures for <u>changes of</u>

zone, Conditional Use Permits, variances...". The notice further pointed out that the proposed ordinance and maps were on file for inspection in the Planning and Zoning Administration office.

If the Board were determining the issue on a clean slate, it could easily find that the notices were not adequate as to content or form in a limited situation such as that before the Board, but under the laws as written and interpreted in the area of zoning we believe, and find, that the notices were specific enough to satisfy the requirements of due process of law.

Recognizing the problem which the applicant faces as a result of the down-zoning of his land, the Board has carefully considered this matter, and has found that even if it were to hold that the notices were inadequate, the result would not benefit the applicant. For, to hold that inadequate notice was given would only set aside the down-zoning action as to the applicant. But, where would the Board then place his land? The natural result of such a decision would be to return the land to "C" (Commercial) where it was situated prior to adoption of the plan and ordinance. But there is no longer a simple "C" Commercial zone. There are now Commercial 1, Commercial 2, and Commercial 3 zones. A placement of the land in question in either of these three zones would be arbitrary because there is no appropriate application before the Board and there is no evidence upon which the Board could make such a decision. And, it would not be proper to re-zone the applicant's property to R-2T because no such zone existed prior to adoption of the plan and ordinance, so, again, placement of the land in R-2T would be arbitrary.

The Board regrets the impact of its decision upon landholders whose property was down-zoned by the plan and ordinance, but sees no way in which it can now soften that impact. The Planning and Zoning Administrator and this Board will assure, however, that any such future notices of plan and ordinance actions which allow down-zoning will specifically so state.

The Board accepts the recommendation of the Planning and Zoning Commission that the application for re-zone be denied, and therefore does not need to reach the matter of a conditional use permit. If, however, the Board did reach that issue, it would find no basis on the record before it to disturb

the findings of the Commission that the conditional use permit be dneied (sic). The evidence before the Commission and before this Board did not sustain the burden which the applicant must bear to prove that a conditional use permit should be issued

ORDER

The Board of Canyon County Commissioners does hereby ORDER that the application for re-zone submitted by Lee Ruwe in this matter be denied, and that the conditional use permit requested by Lee Ruwe for the same parcel of ground be denied.

Dated this 9th day of March, 1984.

CANYON COUNTY BOARD OF COMMISSIONERS
Commissioner Carlos E. Bledsoe, Chairman
Commissioner Del Hobza
Commissioner Glenn O. Koch
ATTEST: Bill A. Staker, Clerk
Fred Kelly Grant, Deputy
Date: 3/9/84

3. Third District Court, State of Idaho, Order of Remand 7 9-85.

RICHARD L. HARRIS
CANYON COUNTY PROSECUTING ATTORNEY
Canyon County Courthouse
Post Office Box 668
Caldwell, Idaho 83606-0668
Telephone: 454-7391

IN THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON

RONALD McDONNELL,	)
	)
Plaintiff/Appellant,	) Case No. L-36760
	)
vs.	) **ORDER TO REMAND**
	)**AND ORDER ADDITIONAL**
BOARD OF COUNTY	) **EVIDENCE BEFORE THE**
COMMISSIONERS,	) **BOARD OF COUNTY**
Canyon County, Idaho,	) **COMMISSIONERS**
	)
Defendant/Respondent.)	

Upon Defendant's Motion to Remand, a hearing was held on May 29, 1985, with counsel for the Plaintiff and Defendant present. After receipt of the Affidavit of Publication and Affidavit of George A. Ottens filed by the Defendant, a Pretrial Conference was conducted on July 8, 1985, with counsel for the Plaintiff and Defendant present. The Court having fully considered arguments of counsel hereby orders, pursuant to Idaho Code 67-5215(e), that this matter be remanded to the Board of County Commissioners to accept additional evidence and to prepare Findings of Fact and Conclusions of Law after considering the following issues:

(1) What notice was given by the Canyon County Planning and Zoning Commission and the Canyon County Board of Commissioners pursuant to Idaho Code 67-6509 and 67-6511 to the public prior to the adoption of the 1979 Canyon County Zoning Ordinance.

(2) Whether the notices provided to the public, as expressed in paragraph (1) for adoption of the 1979 Canyon County Zoning Ordinance complied with the notice provisions of Idaho Code 67-6509 and 67-6511.

The Court further orders that after a hearing on the aforementioned issue, the Board of County Commissioners file with the Court their Findings of Fact and Conclusions of Law and that a transcript of the hearing before the Board of County Commissioners and the supplemented record be filed with the Court within thirty (30) days from entry of this Order.

DATED This 9th day of July, 1985.

EDWARD J. LODGE
Honorable Edward J. Lodge.

CERTIFICATE OF MAILING

I HEREBY CERTIFY That a true and correct copy of the foregoing Order was mailed to Mr. Richard B. Eismann at his post office mailing address of Post Office Box 1330, Caldwell, Idaho, 83606, this _____ day of July, 1985.

GEORGE BREITSAMETER
Deputy Prosecuting Attorney

4. Findings of Fact and Conclusions of Law, issued by Board of County Commissioners 9-6-85.

The following Resolution was considered and adopted by the Canyon County Board of Commissioners on the 6 day of September, 1985: Upon motion of Commissioner Bledsoe and the second by Commissioner Koch the Board resolves as follows: After fully hearing the case upon remand, the Board adopts the attached Findings of Fact and Conclusions of Law. and authorizes the Hearing Officer to forward them, with the Record to the District Court. In view of the Findings of Conclusions entered, if the case is returned to the Board for decision, the Board will grant the application for rezone to R-2T and will entertain renewal of a conditional use permit in the name of the McDonnells.
Motion Carried Unanimously

Carlos E. Bledsoe, Chairman	Yes
Glen O. Koch, Commissioner	Yes
Joyce M. Chase, Commissioner	Yes

Attest: Bill A. Staker, Clerk
Date: 9-06-85

BEFORE THE CANYON COUNTY BOARD OF COMMISSIONERS

IN THE MATTER OF THE ORDER TO REMAND AND ORDER ADDITIONAL EVIDENCE BEFORE THE BOARD OF COUNTY COMMISSIONERS, CASE NO. L-36760

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On September 15, 1983, Lee Ruwe filed a request for rezoning approximately 5 acres of land located on the north side of Karcher Road approximately 1,000 feet west of Middleton Road from A-40 to R-2T. He further requested a conditional use permit which would allow development of a mobile home park on the land. The Planning and Zoning Commission heard the request and recommended to the Board of County Commissioners (hereinafter referred to as the "Board") that the requests be denied.

Mr. Ruwe brought the question to the Board for review, contending that he had not received [sic] adequate notice of the consideration and enactment of the Canyon County Zoning Ordinance of 1979. That Ordinance changed the zoning of the questioned parcel from C-Business to A-40 Agricultural. In a Memorandum dated March 9, 1984, the Board found and concluded that adequate notice was given because the notice complied with requirements of Idaho Code, section 67-6509. The Board denied the request for re-zone and found that it did "not need to reach the matter of a conditional use permit." The Board did further point out, however, that it would have denied the C.U.P. request because the applicant did not provide evidence sufficient to override the Planning and Zoning Commission's recommendation of denial.

Mr. Ruwe sought judicial review of the Board's decision. In the District Court Ronald McDonnell was substituted for Ruwe as the party in interest in the proceeding. Court docu-

ments show that McDonnell and his wife resumed ownership interest in the property in January, 1984, when their sale to Ruwe "'did not work out'" (Affidavit of Sam Lang, filed December 21, 1985, in the District Court). By Order of July 9, 1985, Judge Edward J. Lodge remanded the case to the Board with directions to prepare Findings and Conclusions as to two (2) issues:

"(1) What notice was given by the Canyon County Planning and Zoning Commission and the Canyon County Board of Commissioners pursuant to Idaho Code 67-6509 and 67-6511 to the public prior to the adoption of the 1979 Canyon County Zoning Ordinance.
(2) Whether the notices provided to the public, as expressed in paragraph (1) for adoption of the 1979 Canyon County Zoning Ordinance complied with the notice provisions of Idaho Code 67-6509 and 67-6511."

The Court Order also required that the proceedings on remand be completed and the record filed with the Court within thirty days of entry of the Order. The Board appointed Fred Kelly Grant to serve as hearing officer, provided notice of the remand hearing pursuant to statute, and conducted the hearing on July 31, 1985. Counsel for McDonnell and for the County stipulated to an extension of the time for completing the Findings, Conclusions and Transcript. After due consideration of the testimony and exhibits admitted into evidence, the Board now makes and enters the following Findings of Fact and Conclusions of Law.

1. After remand, the Board appointed Fred Kelly Grant to serve as hearing officer; Legal notice of the public hearing, stating the specific issues to be considered, was published in the official county newspaper, the Idaho Press Tribune on July 15, 1985. On July 12, 1985, letters of notice were mailed by the Hearing Officer to all owners of property located within 300 feet of the McDonnell Property. The letters contained a copy of the Legal Notice. (Copies of the Legal Notice, the letters mailed are attached to these Findings and Conclusions as Hearing Officer Exhibit A.)

2. The notice of the hearing of remand complied with the requirements of Idaho Code, section 67-6509, and Chapter 3, Canyon County Zoning Ordinance.

3. The party in interest, by Order of Court, is now Rona McDonnell instead of Lee Ruwe who initially filed the r quests for re-zone and conditional use permit.

4. The property involved in these proceedings consists of a proximately 5 acres and is located on the north side Karcher Road approximately 1,000 feet west of Middlet Road in Canyon County.

5. The property was purchased by Roy Franks in the mi 1960's, and in 1970 Mr. Franks secured a zone of "Business" for the property.

6. In 1974 Mr. Franks asked the Planning and Zonin Commission for clarification of the zoning and was advise that the property was still zoned C-Business.

7. In December, 1976, Franks sold the property to Rona McDonnell and Phyllis McDonnell, husband and wife.

8. Prior to purchasing the property the McDonnells went the County Planning and Zoning office and aske Administrator George Ottens for clarification of the zoning the property. The McDonnells were advised that the proper was zoned "C".

9. In November, 1977, the McDonnells returned to th Planning and Zoning Office and obtained a copy of the mi utes concerning the 1970 zoning of the property. During th visit they were again advised that the property was zoned "C and were given a copy of a list of uses permitted in a "C" zo by the 1965 Zoning Ordinance.

10. The McDonnells were not advised that the Comprehensi Plan which had been adopted in 1975 provided for an agricu tural zoning for the property.

11. In 1977, the McDonnells listed the property for sale wi John Larson who was a real estate salesman working wi Crown Realty. Mr. Larson needed to know the zoning classi cation in order to attempt to sell the property, so he talke with the Planning and Zoning staff and was advised that t property was in a "C" zone. Since Mr. Larson had not been the real estate business long in Canyon County he relied up the Planning and Zoning staff for information as to the corre

zoning classification and the types of use permitted in that classification. Mr. Larson's partner had a client interested in developing a truck stop, so Mr. Larson called to determine whether such use would be permitted. He again called to determine whether a hearing aid business would be permitted. Each time he was advised that the property was zoned "C".

12. Mr. Larson was not advised that the Comprehensive Plan showed the property as agricultural, or that the County Ordinance to implement the Plan would down-zone the property to agricultural. Had he been so advised he would not have continued to try to sell the land as C-Business property.

13. In February 1978, Lee Ruwe purchased the property from the McDonnells under a contract. After purchasing the property, and prior to June, 1978, Ruwe talked with the Planning and Zoning Administrator to determine the proper procedural steps for developing a mobile home park on the property. The Administrator advised Ruwe that such a park was permissible on the property. Mr. Ruwe was not advised that the Comprehensive Plan showed the property as agricultural, or that the proposed County Ordinance would change the zoning from a C zone down to A-40 Agricultural.

14. Mr. Ruwe did not find out that the property was zoned agricultural until the spring of 1980. Between the spring of 1978 and the spring of 1980 he was involved with the development of an Ada County mobile home park, and didn't return his attention to development of the property at issue until the spring of 1980. It was then that he was orally advised by the Planning and Zoning Administrator that the property had been zoned A-40 by the 1979 County Ordinance.

15. Mr. Ruwe then filed his request for re-zone and a request for a conditional use permit. Prior to the Board's final decision on his requests, his ownership interest in the property was terminated and the McDonnells resumed their full ownership rights in the property in January, 1984.

16. Development of the Comprehensive Plan designating proposed zoning for all land in Canyon County took place during the year 1975.

17. A map of the county showing the proposed zoning was published in the News Tribune on February 25, 1975, along

with an article summarizing the planning process and conte of the plan.

18. Widespread information was provided to the public th the Comprehensive Plan was being developed in 1975. Th county zoning maps which showed the proposed zoning of a land in Canyon County were on display at informational mee ings which were held in Parma, Nampa, Caldwell, and Melb and were on display at the County Planning and Zoning o fice.

19. None of the articles in evidence specifically pointed ou that certain properties would be down-zoned through th Planning process and subsequent ordinance enactment.

20. After the Plan was adopted by the Planning and Zonin Commission and the Board in 1975, the zoning maps staye on display in the Planning and Zoning office. They remaine on display up to, and after, adoption of the Ordinance.

21. Legal notice of the Planning and Zoning Commissio hearing to consider recommendation as to adoption of th Zoning Ordinance was published in the Idaho Free Press an News Tribune on July 9, 1979. Since the hearing was sched uled for July 25, 1979, the 15-day time period requirement o Idaho Code, section 67-6509 was met by this publication.

22. The notice was specific as to the summary of the conten of the Ordinance, but it did not mention the fact that certai parcels of land would be down-zoned if the Ordinance was en acted as proposed.

23. The notice did point out that the maps and the Ordinanc were available for inspection and review at the Count Planning and Zoning office.

24. A copy of the notice was delivered by Administrato Ottens to KCID radio in Caldwell, and to KIVI, televisio channel 6 in Nampa,[sic] Delivered with the copy of the no tice was a written request that the stations "announce the en closed Notice of Public Hearing, as a Public Service.

25. There is no evidence that either station ran the notice as public service, and the policy of both would be to refuse t run the notice as a public service if the newspaper had run

paid notice. Section 67-6509, Idaho Code, requires that the notice be made available to radio and television outlets "for use as a public service announcement."

26. Legal Notice of the Board's hearing to consider adoption of the Ordinance was published in the Idaho Free Press and News Tribune on August 14, 1979. Since the hearing was scheduled for August 30, 1979, the 15-day time period requirement of Idaho Code, section 67-6509, was met by this publication.

27. The notice was specific as to the summary of the contents of the Ordinance, but it did not mention the fact that certain parcels of land would be down-zoned if the Ordinance was enacted as proposed.

28. Again, the notice pointed out that zoning maps and the Ordinance itself were available for inspection and review at the Planning and Zoning office.

29. While the map showed the proposed zoning for all areas of the County in general area terms, property owners might well have to rely upon Administrator Ottens for advice as to how a specific parcel of land was zoned.

30. The Planning and Zoning Commission and the Board did not publically discuss or warn the public about down zoning which was planned for the property at issue.

31. No letters of notice as to hearings on the Ordinance were mailed to property owners. No such letters of notice were mailed to Ruwe or to the McDonnells advising of the proposed down-zoning of the property at issue.

32. Reporter Sam Lang, of the Idaho Press Tribune, covered and reported consideration and enactment of the Ordinance. Administrator Ottens made information available to Mr. Lang from May, 1979, through enactment of the Ordinance in a continually cooperative manner. But, no one specifically pointed out to Mr. Lang that certain properties would be down-zoned.

33. Leading to the Conclusions entered in this case by the Board, the following sequence of events is found to exist factually:

1970 Roy Franks obtained C zone.

1974 Roy Franks confirmed C zoning with Planning ar Zoning Commission.

1975 Plan was developed and adopted--property at issu was in the A-40 zoning area of Plan.

1976 McDonnells bought property from Franks ar checked zoning with Mr. Ottens. They were advised that zo ing was C. They were not advised that the Plan contemplate A-40 zoning.

1977 McDonnells listed property with Mr. Larson as commercial property. Larson checked the zoning with M Ottens and staff and on each occasion the C zoning was co firmed. Also Mr. Larson confirmed permissibility of specif commercial uses. He was not advised that the property he wa trying to sell as commercial had been placed in the agricultu al zone by the Comprehensive Plan.

1977 McDonnells returned to the Planning and Zoning o fice and obtained a copy of the Minutes of the Planning ar Zoning Commission meeting where the C zone was confirme for Roy Franks. They were given a copy of the permissib uses under a C zone as identified in the 1965 Ordinance. The were not advised that the property was placed in an A-40 agr cultural zone by the Comprehensive Plan.

1978 Lee Ruwe bought the property under contract fro the McDonnells for the purpose of developing a mobile hom park. He then checked with the Planning and Zoning office t confirm the permissibility of such development and to dete mine the steps necessary to initiate the development. He wa not advised that the property had been placed in an A-40 agr cultural zone by the Comprehensive Plan.

1980 Lee Ruwe discovered that the land was zoned agr cultural when he finished his Ada County development ar returned his attention to the land in issue.

34. The notices provided to the public in general regardi adoption of the 1979 Canyon County Zoning Ordinance con plied with the notice provisions of Idaho Code, section 6

6509 and 67-6511, and they adequately indicated to the public that a comprehensive revision of zoning was to take place, advised interested persons where and when maps of the proposed zoning and text of the proposed Ordinance could be examined, and indicated that a public input hearing would occur prior to adoption.

35. As to the McDonnells' property, in particular, the notices provided prior to adoption of the Ordinance were not adequate in that they, when read in conjunction with the information provided by the County Planning and Zoning office regarding the C zoning of the property, were not sufficiently specific to warn the interested persons identified in these Findings that the McDonnell property might be affected by down-zoning unless they appeared and voiced objections to the contents of the proposed Ordinance.

36. The notices as they regard the McDonnells' property, considered together with the reliance placed upon advice from the County Planning and Zoning office, did not comply with the notice provisions of Idaho Code, section 67-6509 and 67-6511.

CONCLUSIONS OF LAW

1. As described in the Findings of Fact, legal notice, and supplemental notice and information, with regard to the adoption of the 1979 Canyon County Zoning Ordinance was provided both as to the adoption of the Comprehensive Plan and the Ordinance which implemented it.

2. The notices provided to the public, both in terms of legal notice and supplemental notice and information, adequately indicated to the public that a comprehensive revision of zoning was to take place, advised that maps of the proposed zoning and text of the proposed Ordinance were available for inspection and review in a specified place, and indicated that a public input hearing would occur on a specified date prior to adoption. (See Golden Gate Corp. v. Town of Narragansett, 359 A.2d 321, (Rhode Island, 1976).

3. The notices provided to the public, both in terms of legal notice and supplemental notice and information, complied with notice provisions of the Idaho Code, sections 67-6509 and 67-6511.

4. The notices provided, when considered together with the
liance placed by persons interested in the ownership of
McDonnells' property upon advice given by the Cou
Planning and Zoning office, did not specifically warn these
terested persons that the property might be affected by do
zoning unless they appeared and voiced objections to the c
tents of the proposed Ordinance. (See American Oil Corp
City of Chicago, 331 N.E. 2d 67 (Ill. App. 1975); Midw
Protective League v. City of Dallas, 552 S.W. 2d 170 (T
1977).

5. The notices, therefore, when considered together with
reliance placed upon the advice given by the County Plann
and Zoning office, did not comply with the provisions
Idaho Code, section 67-6509 and 67-6511 as to
McDonnells' property.

**5. Judgment on appeal from the Order of Cou
Commissioners for Canyon County, Idaho, issued
Judge Lodge, Third District Court, State of Idaho 3-13-**

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Caldwell, Idaho 83606-1330
Telephone: (208) 467-3100
js

IN THE DISTRICT COURT OF THE THIRD JUDICI
DISTRICT OF THE STATE OF IDAHO, IN AND FOR T
COUNTY OF CANYON

RONALD McDONNELL, substituted for LEE RUWE,	)
Plaintiff/Appellant,	) Case No. L-36760
-vs-	)
BOARD OF COUNTY COMMISSIONERS, Canyon County, Idaho,	)
Defendant/Respondent.	)

Appendix A

JUDGMENT ON APPEAL FROM THE ORDER OF COUNTY COMMISSIONERS FOR CANYON COUNTY, IDAHO

THIS APPEAL came on for hearing before the Court on the date of March 7, 1986.

THE APPEARANCES made were: Richard B. Eismann appeared as counsel for Ronald McDonnell; and George Breitsameter, Deputy Canyon County Prosecuting Attorney, appeared as counsel for the Board of Commissioners of Canyon County.

THE COURT, having reviewed the records and files herein and having heard and considered the arguments of counsel, and good cause appearing therefore:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That neither the constitutionality of Idaho Code Sections 67-6509 and 67-6511 nor the constitutional sufficiency of the notices referred to in paragraphs 2 and 3 below are before the Court and the Court makes no decision thereon.

2. That the public notices given by the Canyon County Planning and Zoning Commission prior to its adoption of the 1979 Canyon County Zoning Ordinance complied with the notice provisions of Idaho Code Section 67-6509 and 67-6511.

3. That the public notices given by the Board of Commissioners of Canyon County, Idaho, prior to its adoption of the 1979 Canyon County Zoning Ordinance complied with the notice provisions of Idaho Code Sections 67-6509 and 67-6511.

4. That under the facts and circumstances of this case, equitable estoppel as found by the Board of County Commissioners for Canyon County applies in favor of the plaintiff Ronald McDonnell.

5. That the subject premises are given a classification of C2 under the Canyon County Zoning Ordinance approved and adopted on the date of September 6, 1979, which zoning clas-

sification is substantially the same as the prior zoning classi
cation of C under the Canyon County Zoning Ordinance a
proved and adopted on the date of January 11, 1965.

6. That the Order of the Board of County Commissioners f
Canyon County dated September 6, 1985, in all other respec
is affirmed.

7. That the subject premises referred to herein are situated
Canyon County, Idaho, and described as follows:

Beginning at the SW corner of the SE1/4 of Section 7 in Tw
3 N., Rge. 2 W., B.M. and bearing East 873.1 feet, along t
South boundary of the aforesaid Section 7 to the REA
POINT OF BEGINNING;

thence North 517.4 feet on a line parallel to the West boun
ary of the SE1/4 of the aforesaid Section 7 to the center of t
Elijah Drain;

thence South 63°30' East 391.1 feet along the center of t
Elijah Drain;

thence South 342.9 feet to the South boundary of the aforesa
Section 7;

thence West 350 feet along the aforesaid South boundary
the REAL POINT OF BEGINNING.

AND

Commencing at the SW corner of the SE1/4 of Section 7
Twp. 3 N., Rge. 2 W., B.M. and bearing East 1223.1 fe
along the South boundary of the aforesaid Section 7 to t
REAL POINT OF BEGINNING;

thence North 342.9 feet on a line parallel to the West boun
ary of the SE1/4 of the aforesaid Section 7 to the center of t
Elijah Drain;

thence meandering South 63°30' East 361.2 feet, Southea
197.5 feet along a curve to the right with a radius of 287.9 fe
and South 24°0' East 43.2 feet along the center of the Elij
Drain to the intersection of the South boundary of the afor
said Section 7;

thence West 475.7 feet along the aforesaid South boundary line to the REAL POINT OF BEGINNING.

DATED: March 12, 1987
SIGNED: District Judge Edward J. Lodge

STATUTES

1. **14th Amendment to the Constitution of the United St of America, Section 1:**

   "All persons born or naturalized in the United States, and ject to the jurisdiction thereof, are citizens of the United S and of the State wherein they reside. No State shall mak enforce any law which shall abridge the privileges or imm ties of citizens of the United States; nor shall any State prive any person of life, liberty, or property, without due cess of law; nor deny to any person within its jurisdictio equal protection of the laws."

2. **Idaho Code §67-6509. Recommendation and adopt amendment, and repeal of the plan.**-- (a) The plannin planning and zoning commission, prior to recommendin plan, amendment, or repeal of the plan to the governing bo shall conduct at least one (1) public hearing in which inte ed persons shall have an opportunity to be heard. At leas teen (15) days prior to the hearing, notice of the time place and a summary of the plan to be discussed shall be lished in the official newspaper or paper of general circula within the jurisdiction. The commission shall also make a able a notice to other papers, radio and television sta serving the jurisdiction for use as a public service annou ment. Following the commission hearing, if the commis makes a material change in the plan, further notice and h ing shall be provided before the commission forwards the with its recommendation to the governing board. A reco the hearings, findings made, and actions taken shall be m tained.

   (b) The governing board, prior to adoption, amendment, o peal of the plan, shall conduct at least one (1) public hea using the same notice and hearing procedures as the com sion. The governing board shall not hold a public hea give notice of a proposed hearing, nor take action upo plan, amendments, or repeal until recommendations have received from the commission. Following the hearing o governing board, if the governing board makes a ma change in the plan, further notice and hearing shall be pr ed before the governing board adopts the plan.

(c) No plan shall be effective unless adopted by resolution or ordinance by the governing board. An ordinance enacting a plan or part of a plan may be adopted, amended, or repealed by reference as provided for in sections 31-715 and 50-901, Idaho Code, three (3) copies of which shall be on file with the city clerk or county clerk.

(d) Any person may petition the commission or, in absence of a commission, the governing board, for a plan amendment at any time. The commission may recommend amendments to the plan to the governing board not more frequently than every six (6) months to correct errors in the original plan or to recognize substantial changes in the actual conditions in the area. The commission may recommend amendments to other ordinances authorized by this chapter to the governing board at any time. [I.C., § 67-6509, as added by 1975, ch. 188, § 2, p. 515.]

3. **Idaho Code §67-6511. Zoning ordinance.**-- Each governing board shall, by ordinance adopted, amended, or repealed in accordance with the notice and hearing procedures provided under section 67-6509, Idaho Code, establish within its jurisdiction one (1) or more zones or zoning districts where appropriate. The zoning districts shall be in accordance with the adopted plan.

Within a zoning district, the governing board shall where appropriate, establish standards to regulate and restrict the height, number of stories, size, construction, reconstruction, alteration, repair or use of buildings and structures; percentage of lot occupancy, size of courts, yards, and open spaces; density of population; and the location and use of buildings and structures. All standards shall be uniform for each class or kind of buildings throughout each district, but the standards in one (1) district may differ from those in another district.

Ordinances establishing zoning districts shall be amended as follows:

(a) Requests for an amendment to the zoning ordinance shall be submitted to the zoning or planning and zoning commission which shall evaluate the request to determine the extent and nature of the amendment requested.

(b) If the request is in accordance with the adopted plan, th zoning or planning and zoning commission may recommen and the governing board may adopt or reject the ordinanc amendment under the notice and hearing procedures provide in section 67-6509, Idaho Code, provided that in the case of zoning district boundary change, additional notice shall b provided by mail to property owners and residents within th land being considered; three hundred (300) feet of the extern boundaries of the land being considered; and any addition area that may be impacted by the proposed change as dete mined by the commission. When notice is required to tw hundred (200) or more property owners or residents, alterna forms or procedures which would provide adequate noti may be provided by local ordinance in lieu of mailed notice.

(c) If the request is not in accordance with the adopted pla the request shall be submitted to the planning or planning an zoning commission or, in absence of a commission, the gov erning board, which shall recommend and the governin board may adopt or reject an amendment to the plan under th notice and hearing procedures provided in section 67-650 Idaho Code. After the plan has been amended, the zoning o dinance may then be amended as provided for under sectio 67-6511(b), Idaho Code. [I.C., § 67-6511, as added by 197 ch. 188, § 2, p. 515.]

4. **Idaho Code §67-6514. Existing zoning or subdivision ord nances.--** A governing board, using any zoning or subdivisio ordinance in existence on the effective date of this chapte shall conduct a review of those ordinances and shall mak necessary amendments in accordance with this chapter prior January 1, 1978, following notice and hearing pursuant to sec tion 67-6509, Idaho Code. [I.C., § 67-6514, as added by 197 ch. 188, § 2, p. 515.]

5. **Idaho Code § 67-6519. Permit granting process.**-- As pa of ordinances required or authorized under this chapter, a pro cedure shall be established for processing in a timely manne applications for permits for which a reasonable fee may b charged. Each application for a permit required or authorize under this chapter shall first be submitted to the zoning planning and zoning commission for its recommendation decision. The commission shall have a reasonable time fixe by the governing board to examine the application before th commission makes its decision on the permit or makes its rec

ommendation to the governing board. Each commission or governing board shall establish by rule and regulation a time period within which a recommendation or decision must be made. Whenever a governing board or zoning or planning and zoning commission grants or denies a permit, it shall specify:

(a) the ordinance and standards used in evaluating the application;

(b) the reasons for approval or denial; and

(c) the actions, if any, that the applicant could take to obtain a permit.

An applicant denied a permit or aggrieved by a decision may within sixty (60) days after all remedies have been exhausted under local ordinance seek judicial review under the procedures provided by sections 67-5215(b) through (g) and 67-5216, Idaho Code. [I.C., § 67-6519, as added by 1975, ch. 188, § 2, p. 515.]

6. **APA 67-5215. Judicial review of contested cases.**-- (a) A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case of an agency other than the industrial commission or the public utilities commission is entitled to judicial review under this act. This section does not limit utilization of or the scope of judicial review available under other means of review, redress or relief provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(b) Except when otherwise provided by law, proceedings for review are instituted by filing a petition in the district court of either the county in which the hearing was had or the county in which the final decision of the agency was made, within 30 days after the service of the final decision of the agency or, if a rehearing is requested within 30 days after the decision thereon.

(c) The filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(d) Within 30 days after the service of the petition, or wit
further time allowed by the court, the agency shall transmi
the reviewing court the original or a certified copy of the
tire record of the proceeding under review. By stipulation
all parties to the review proceedings, the record may be sh
ened. A party unreasonably refusing to stipulate to limit
record may be taxed by the court for the additional costs.
court may require subsequent corrections to the record
may also require or permit additions to the record.

(e) If, before the date set for hearing, application is made
the court for leave to present additional evidence, and i
shown to the satisfaction of the court that the additional e
dence is material and that there were good reasons for fail
to present it in the proceeding before the agency, the co
may order that the additional evidence be taken before
agency upon conditions determined by the court. The age
may modify its findings and decisions by reason of the ad
tional evidence and shall file that evidence and any modifi
tions, new findings, or decisions with the reviewing court.

(f) The review shall be conducted by the court without a j
and shall be confined to the record. In cases of alleged irre
larities in procedure before the agency, not shown in
record, proof thereon may be taken in the court. The co
upon request, shall hear oral argument and receive writ
briefs.

(g) The court shall not substitute its judgment for that of
agency as to the weight of the evidence on questions of f
The court may affirm the decision of the agency or remand
case for further proceedings. The court may reverse or mo
the decision if substantial rights of the appellant have b
prejudiced because the administrative findings, inferenc
conclusions, or decisions are:
(1) in violation of constitutional or statutory provisions;
(2) in excess of the statutory authority of the agency;
(3) made upon unlawful procedure;
(4) affected by other error of law;
(5) clearly erroneous in view of the reliable, probative,
substantial evidence on the whole record; or
(6) arbitrary or capricious or characterized by abuse of dis
tion or clearly unwarranted exercise of discretion. [1965,
273, § 15, p. 701.]

Reference to Federal Question

1. Transcript of Planning and Zoning Commission hearing 11-2-83.

p. 5 L. 20-22:

MR. ROSANDICK: Did you ever receive any notification of this being rezoned?

MR. RUWE: No sir, no sir.

p. 7 L. 19-25, p. 8 L. 1-10:

MR. OTTENS: The only information we have on the Assessor's roll, Mr. McDonnell is the recorded owner on the property.

MR. MCDONNELL: In other words the deed is in our name, is that what you're talking about?

MR. JOHNSON: You're the owner of record.

MR. ROSANDICK: You're the owner of record.

MR. OTTENS: You're the owner of record.

MR. MCDONNELL: Yes and, ah, there was never anything give to us sayin that, ah, the zoning was taken off, we was'nt even notified, anything. When we found out about it Mr. Ruwe told us. I don't know why it ever happened that we was'nt notified or Mr. Ruwe was'nt notified when this went back to, to ah, out, you know farm ground, when it was already zoned for business, that just don't make sense to me. That's one reason I'm down here now, to see what's going on.

p. 31 L. 21-25:

[MR. OTTENS:] They rezoned the entire county in accordance with the Comprehensive Plan. Notices were not sent out to individual property owners, we were advertising in the newspaper, we held public hearings in the Nampa area, we also advertised on television and radio....

2. Transcript of Board of County Commissioners hearing 1-26-84.

p. 14:

MR. KOCH: At that time I assume Planning and Zoning hearings were spread throughout the county, is that correct?

MR. OTTENS: Yes.

MR. KOCH: Do you know um was a notice ever sent to the owner of record on this property or to Mr. Ruwe?

MR. OTTENS: It was not.

MR. KOCH: Why was it not?

MR. OTTENS: Under the Land Use Act, see we were adopting the... the Canyon County Zoning Ordinace [sic] and maps. Under the Land Use Act, as far as the notification of property owners, it states that if 200 or more persons are to be notified, then alternate methods may be used. So what we did, we advertised in the Parma paper, in the Owyhee Nuggett, also in the Trubune [sic] or the...see the Free Press I guess...the official conty newspaper you [sic] Honor. We hcld hearing in Melba, Nampa, Caldwell, Parma, umm, 'bout it I guess. But in addition also I might mention in addition to the newspaper publications we also send [sic] notices to both channel 6 tv and also the local radio station.

MR. KOCH: I have no further questions.

MR. HOBZA: May I ask a question.

MR. GRANT: Yes sir.

MR. HOBZA: Ah, Mr. Otten if you saw a legal description of your property would you know it was yours.

MR. OTTENS: I would, yes.

MR. HOBZA: You would consider yourself the exception to the rule though wouldn't you?

MR. OTTENS: Possibly, yes.

3. Appeal to Third District Court, State of Idaho 5-7-84.

(6) A statement of the issues on appeal which the appellant now intends to assert is as follows:

(a) That the notice given by the defendant-respondent in the down zoning of the subject premises from "C" (commercial) under the zoning ordinance in effect in 1970 to A-40 under the zoning ordinance adopted in 1979 was not sufficient to constitute due process of the law and such action and down zoning is void as to the subject premises and as to the plaintiff-appellant.

(b) That the subject premises are now unzoned or in the alternative are now zoned "C" (commercial) under the zoning ordinance in effect in 1970.

4. Transcript of Motion, Third District Court, State of Idaho. Judge Williams 2-22-85.

p. 13 L. 6-12:

COURT: So I'm certainly not adverse to that. But that's the kind of thing I'm looking for. I'm not looking just to go back and have them ask questions of him because we're talking about basic constitutional questions in this case.

MR. BREITSAMETER: That's what this motion does address.

5. Transcript of Motion to Remand, Third District Court, State of Idaho, Judge Lodge 5-28-85.

p. 3 L. 4-25, p. 4 L. 1-23 p. 6 L. 25, p. 7, L. 1-25, p. 8 L. 1-8:

DEPUTY PROSECUTING ATTORNEY WILLIAM A. MORROW: But at any rate, the issue, as I understand it, the chief issue on appeal is that there was defective general notice of the passage of the 1979 Canyon County Zoning Ordinance; that is, and we are not talking about notice to a particular individual, but about a particular hearing on a particular request. We are talking about notice of the passage of the entire document and ordinance that would regulate zoning within the County. This was significant because the County had a prior zoning ordinance, as I know the Court is aware of, and that

passage of a new zoning ordinance would in effect appeal the prior zoning ordinance, and so the issue, as suggested by appellant, is that because he alleges there was a defective notice of the 1979 consideration of the zoning ordinance, his prior standing, prior per the 1970 ordinance, should be the effective standing for his zoning classification for his parcel of property.

"Our position, the state's position, is first of all that there was a hearing before the Board of County Commissioners, the order on appeal dated June 11, 1984, sets up the appeal as an appellant proceeding as opposed to de nouveau, and further, that the APA 67-5215 does require an appellant proceeding, and does indicate the guidelines for the Court to follow in reviewing the case, and specifically with respect to the motion by the County at this time, 67-5215 sub-small (e) provides the basis for the motion. This section indicates that a party may move for a remand for additional evidence to adduce additional evidence upon a finding of two factors by the Court:

"One, that additional evidence is material to the consideration before the Court; and
"Two, that the Court is satisfied that there are good reasons for failure to present the evidence at the lower proceeding.

"In this particular instance, the County is requesting a remand to embellish, augment, supplement the record to adduce proof of additional type of notice that was published or transmitted through the media prior to the passage of the 1979 zoning ordinance. That, I would submit to the Court, is the very crux of the issue presented on appeal by appellant, and therefore the materiality of the request by the County should not be a question here.

"However, I would note for the Court, as Mr. Breitsameter did in his motion, that neither the county nor the appellant at the Board of County Commissioners' hearing was represented by counsel. It appears to me that Mr. Breitsameter apparently in perusing or in reviewing the record, felt there was a need to supplement it with additional notice that was not presented at the Board of County Commissioners' hearing. Thus, it would appear to me that if the notice were appropriate then, the issue before the Court, rather than notice, would be one of non-conforming use of the property in question and the laws pursuant to that particular area of zoning law, decisions, or whatever,

would be applicable in this particular appeal, and I think it would be a more appropriate avenue to address.

"Finally, as an alternative, 67-5215 sub (f), the section that immediately follows the section we have cited for our motion, does allow or does permit proof to be adduced at the hearing on appeal if the Court determines there are irregularities that occurred in the hearing below, and I'm not sure exactly what irregularities mean, but it would appear to me that on the type of issue presented before the Court on this appeal, that the need for a full factual background and record of the actual notices that did occur prior to the passage of the 1979 zoning ordinance would be something that the Court would want to have before it, whether on remand to the Board of County Commissioners, or whether actually heard prior to arguments in the hearing before this Court.

"It would seem to me in order to make a meaningful decision and a valuable decision, the full scope of the notice would be important for the Court to consider."

p. 10 L. 13-21:

[MR. EISMANN:] If there is no other form that the county has seen fit to set up, there is not a matter of compliance with the alternative; it's a compliance with the first requirement of the statute, the mailing of the notice. So if they don't meet the exception and they are unable to allege they do meet this exception, then there would be no point in going back to the Board of County Commissioners or spend any time whatsoever in determining what the exception is or how it has been met.

p. 21 L. 3-25, p. 22 L 1-6:

I would like to have seen both sides represented by counsel, because I think it is important and in the best interest of the public that the Court not make a decision that could create havoc for a lot of people and for the county by determining that the ordinance itself was unconstitutional, unless absolutely necessary. The argument that you made intrigues me about the fact that if this were sent back, and if counsel were representing the county, they could conceivably look at this as a specific case rather than generally, and maybe determine that the notice was not regular, or failed to satisfy due process re-

quirements and grant the appellant here a conditional use p
mit. There may be two or three other parties that would foll
but it may not disrupt the whole zoning plan. I think what I
going to do initially is to try to help the parties speed this m
ter along as well as perhaps handle it in the most judici
manner. I will allow the State ten days within which to supp
ment their brief. There is no affidavit, just their motion.
showing and demonstrating to the Court that there is in f
good reason for remanding this matter and for the county
to have raised these issues initially.

Then I will have a pretrial conference with counsel onc
have had a chance to look at that and see what is there for
purpose of possibly remanding this matter so that it may
handled individually as a request for a conditional use per
or variance rather than as a constitutional issue.

6. **Transcript of Oral Arguments, Third District Court, St
of Idaho, Judge Lodge 3-7-86.**

p. 14 L 11-12.

[MR. EISMANN:] These notices are jurisdictional. The or
nance stands or falls on the effect of a notice.

7. **Transcript of Oral Arguments before Idaho Supre
Court 4-12-89.**

p. 7 L. 23-25, p. 8 L. 1-25, p. 9 L. 1-6:

MR. WHITE: The Respondent, I have got to again reitera
demanded a remand hearing in front of Judge Lodge an
was Respondent who said this is a Constitutional question,
need a remand to determine what notice was given and whe
er or not it complied with due process, and so when it ca
back to Judge Lodge after the remand, that was still the issu

Their prior counsel, who, for one reason or another, is
their counsel now, stated that the notice given by
Defendant Respondent in the down-zoning of the subject
mises from C under the zoning ordinance in effect in 197
A-40, which is agricultural pasture, under the zoning o
nance adopted in '79, was not sufficient to constitute due

cess of the law and such action and down-zoning is void as to the subject premises and to the Plaintiff Appellant, and they were asking for their C back or, alternative, a no-zone at that time.

Now I can't understand why appeal to this Court is now moot because there was a failure to exhaust remedy. Judge Lodge overturned the Board of County Commissioners and he, in essence, said that the notice was suffcient to give the Appellants notice that their zoning was going to be down-zoned by the new ordinance.

We are here before this Court appealing from Judge Lodge's overruling of the County Commissioners on that point, additionally, still asserting that the notice was -- procedurally is defective under the Constitution of either the United States Constitution or Idaho State Constitution or both. Certainly the record demonstrates that the Respondent Canyon County, both of the administrative bodies, Planning and Zoning and the County Commissioners, failed to comply with the 1975 Local Planning Act and that's been pointed out in both the original brief and I think the briefs for this rehearing.

p. 10 L. 3-13:

Certainly here the record will demonstrate that Canyon County knew exactly who owned this property. There is no reason why they couldn't have gotten a written notice that their property was going to be down-zoned and, as I have set out in my initial brief, there was no written notices given, there was not any notices given by T.V. or advertisement, and there wasn't an ordinance passed in lieu of all of these in the event that more than 200 people or 300 people are involved, and the record will not support that more than 200 people were involved in this matter.

p. 11 L.13-25, p. 12 L. 1-4:

JUSTICE: Precisely what relief do you request of this Court if we were to determine there was a violation of due process?

MR. WHITE: Well, the ordinance is void. If it's void, it's void from its inception and never was valid. An invalid ordinance, at least in my opinion, cannot repeal a valid one. I believe the '65 zoning ordinance would still be current and in ef-

fect, but, beyond that, the county could not then interfe
meddle with the Appellants' opportunity or right to deal
that property in any fashion that they could have done
the '65 zoning ordinance, and I don't believe that such a
is going to create havoc, because anything that's in -- bu
in existence right now would have to, under the new pla
ordinance, be taken into consideration, or you would hav
other round of litigation on down-zoning without notice.

p. 13 L. 1-11:

[MR. WHITE:] So the only reason that I can see -- or the
way that I can see my clients are going to dodge the futur
gation is either the ordinance is void as to them and the
do whatever they could have done under the '69 ordinanc
there has to be a perpetual injunction against the county
interfering.

JUSTICE: You said some words that intrigued me. Yo
void as to them. If it's void, it's void, is it not?

MR. WHITE: It's void to the whole county, in my opi
but at least it's void to the Appellants.

p. 15 L. 18-21:

[MR. WHITE:] I think the Court is obliged to deal wit
Constitutional challenge that we have brought befor
Court and to -- at least to appellants' opinion to void the
nance.

p. 16 L. 3-25, p. 17 L. 1-25, p. 18 L. 1-25, p. 19 L. 1-25:

[MR. SAARI:] Secondly, and most critically, I have ne
bring to this Court and counsel. I consulted with the Ca
County Board of Commissioners yesterday and they,
open public meeting, have agreed, number one, that th
lowed uses spoken of by counsel and this Court in the
hearing with regard to the laundromat, with regard to the
ry-out with the gas pumps and the convenience store, wi
gard to the car wash, they will grant and direct the granti
a building permit, subject to setback and other requiremen
the Uniform Building Code, which all people have to
compliance with, and public health and safety requiremen

Additionally --

JUSTICE: What you're suggesting, Mr. Saari, I gather, is we don't need to be here today.

MR. SAARI: Yes, sir. If I may further explain.

We also are going to -- according to the open meeting I attended yesterday, they will grant the McDonnells a conditional use permit with regard to the -- having a mobile home park on the subject property, after a public hearing, in a C-2 zone, subject to only the setback requirements of the Uniform Building Code, and public health and safety requirements to be brought to issue at a public hearing.

For example, there would be a large drain there, it will have to pass Southwest District Health requirements, as everyone does in Canyon County. There are requirement with regard to where the gasoline pumps would have to be, things like that. The administrative remedy awaits them. All they have to do is go get it.

Additionally, and most importantly, with regard to the due process, Constitutional issues raised, it is a longstanding principle of this Court and the United States Supreme Court that when it is not necessary to reach the Constitutional issues, when it's not necessary to the remedy, the Court will abstain and find -- make its ruling based upon other grounds. Therefore, we firmly believe that the exhaustion of administrative remedies argument is vital here and alive, especially at this point in time, especially since, when Judge Lodge granted his decision, in a sense giving the relief, almost in total, which the Appellant wanted on March of 1987, when, in fact, he allowed the C-2 zone to be in existence with regard to this property, he used basically his authority and equitable doctrines of this Court, as well as a blend of authority from the Administrative Procedures Act, as well as the Local Planning Act and, in fact, put it back in the arena of the Canyon County zoning officials, the Canyon County Board of Commissioners.

JUSTICE: Mr. Saari, let's go back a minute. You come up here and give us this good news. Had you told Mr. White about the good news before you got here today.

MR. SAARI: No, sir.

JUSTICE: What was the point of not informing him?

MR. SAARI: Your Honor, with regard to your inquiry, it w not, as a matter of fact, decided until yesterday, late in the ternoon -- it wasn't even put in a resolution form, it was ju discussed at an open public meeting, and we bring this infc mation to the Court as a means of resolving this case, whi we believe is equitable to all parties concerned.

JUSTICE: Well --

JUSTICE: How do we know what you have just told us is fa tual and correct in all details?

MR. SAARI: Your Honor, behind me are the Canyon Coun Board of Commissioners. Commissioner Glenn Koc Commissioner Joyce Chase, Commissioner Carlos E. Bledsc They will affirm before the Court --

JUSTICE: No, they won't affirm before the Court, counse because this is not a trial court where we hear witnesses. I, one member of this Court, are very deeply disturbed at yo action. You say that you did not tell Mr. White any of th quote, "good news." This good news evidently happened ye terday. You're here today as an officer of this Court, are yc not?

MR. SAARI: Yes, sir.

JUSTICE: Very well. Continue your argument.

MR. SAARI: Sir, as an officer of the Court, what I stated you is factual.

Additionally, Your Honor, with regard to Judge Lodge's --

JUSTICE: Well, I will say for one, that if you have -- if yc think you have a basis on which you can settle this matte that's between you and Mr. White, and if you can come to agreement and notify the Court, that indeed, is good news us, but, in the meantime, it seems to me that until we get stipulated -- stipulation for settlement, we have got to proce on this case as though we are going to have to decide th case.

MR. SAARI: Yes, sir.

JUSTICE: Now does that seem to be the correct way that this thing ought to be handled to you?

MR. SAARI: Yes, sir.

JUSTICE: All right.

p. 26 L. 18-25, p. 27 L. 1-25, P. 28 L. 1-25, p. 29 L. 1:

JUSTICE: Mr. Saari, I'd ask you to assume, for purposes of my question, something I'm sure you'd like not to assume. whatever it happens to deal with. I'd ask you to assume that this Court might find there was a violation of due process. What is the range of alternative disposition, in your opinion. we could come down with, if we so found?

MR. SAARI: Your Honor, with regard to due process violations on the zoning ordinance, we believe that the Court could. and if it so was inclined, and wished to strike down the Canyon County zoning ordinance, could perhaps view the matter in a similar vein to which Judge Lodge viewed it with regard to the equitable estoppel doctrine and only apply it to the particular parties of law.

But, Your Honor, with regard to the situation --

JUSTICE: I want to be sure I understand what you're saying. You're saying we could do something comparable to what Judge Lodge did -- I'm not talking about applying equitable estoppel, I'm talking about finding there was a violation of due process, and as I understood you to say, we could somehow selectively say that since this violation of due process occurred, that the voiding of the ordinance would only relate to Mr. White's clients.

MR. SAARI: Your Honor, the way I would respond to that question is under the language in the recent Supreme Court case, which counsel for the Appellant spoke of, we are talking about a balancing test, and I believe that based upon that balancing test -- and, in fact, when --

JUSTICE: You're talking about the Nollan case?

MR. SAARI: In the Nollan case we are talking about adv
ing a governmental interest, we believe that advancing a
ernmental interest should maintain the intactness of the
zoning ordinance, especially when the particular par
going to get the relief he needs. We don't think it's neces
to reach that issue and we don't have an absolute answer
the way to reach that issue when it's not necessary to rea
Your Honor.

JUSTICE: Well, is that merely pushing the matter back a
though, because of the doctrine of collateral estoppel?
party who is also so injured, who is in the same positio
Mr. White's clients, wouldn't have a very hard time getti
judgment out of any court in the state based on our deci
would they?

MR. SAARI: Perhaps not, Your Honor.

JUSTICE: So are we just pushing the matter back ano
step.

MR. SAARI: Well, Your Honor, I believe, likewise, i
have a situation where the county has said that it is goin
grant a conditional use permit, subject to the various co
tions I mentioned, people have to have -- are similarly af
ed, but it's important to note that this particular case her
volves conversations with the Appellants and the dece
zoning administrator.

JUSTICE: Well, I'm asking you to assume a violation of
process, not estoppel, and I think I understand your answe

Appendix D

JUDGMENT FROM SUPREME COURT OF IDAHO

1. Judgment of Idaho Supreme Court, Opinion III, 8-7-89.

1989 Opinion No. 111

In the Supreme Court of the State of Idaho

No. 16921

RONALD MCDONNELL substituted for LEE RUWE,	)
Plaintiff-Appellant,	) Boise April 1989 Term
v.	) Filed: August 7, 1989
THE BOARD OF COUNTY COMMISSIONERS, CANYON COUNTY, IDAHO	) Frederick C. Lyon, Clerk
Defendant-Respondent	) 1988 Slip Opinion No. 119, filed December 21, 1988, is withdrawn and this opinion substituted therefore

Appeal from the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon. Honorable Edward J. Lodge, District Judge.

Appeal from an appellate judgment of the district court following appeal from the Board of the Canyon County Commissioners' denial of request for permission to construct a mobile home park and other facilities. Held, judgment of the district court affirmed with modifications.

Kenneth F. White, Nampa, Idaho, attorney for the appellant.

Richard L. Harris and Charles L. Saari, Caldwell, Idaho, attorneys for the respondent. Charles L. Saari argued.

ON REHEARING

HUNTLEY, J.

This appeal is pursued by McDonnell, a property owne
claims that his applications for permission to develop a m
home park, laundry mat, car wash and convenience sto
his property were improperly denied by the Board o
Canyon County Commissioners.[1] In 1975 the county ad
a comprehensive plan designating the parcel involved as
cultural. In 1979 the county adopted an ordinance w
brought its zoning into conformity with the comprehe
plan and formally reclassified the parcel as agricultural
1979 ordinance repealed the 1965 ordinance which had c
fied the parcel as commercial ("C"). Mr. McDonnell ha
quired the subject property in 1976.

In November of 1983, the Commissioners, acting in a
dance with the recommendation of the County Planning
Zoning Commission, denied requests for a rezone and a c
tional use permit which had been filed on Septembe
1983.[2] McDonnell appealed to the district court whic
manded the case to the Commissioners for an evide
hearing requesting findings of fact and conclusions of la
garding the public notices given preceding adoption o
1979 zoning ordinance. The Commissioners adopted fin
and conclusions ruling that although the notices given
plied with I.C. §§ 67-6509 and 67-6511 when viewed
pendently of all else, the notices did not comply with the
visions of I.C.§§ 67-6509 and 67-6511 as to the McDo
property when considered together with reliance place
certain advice given by the County Planning and Zonin
fice. The district court disagreed, ruling that the notice
comply with the statutory provisions but, nonetheless, ap
equitable estoppel on behalf of McDonnell and ruled th
property is entitled to a "C-2" commercial classification
the present ordinance.

---

1. Actually, the applications for permission to develop this parcel wer
by Lee Ruwe, who, at the time of such filing was a contract purch
McDonnell's property. After the contract for sale was terminat
district court formally substituted McDonnell for Ruwe as the
party in the present action.

2. Early in 1980, an application for a building permit for the construc
a mobile home park was filed and denied. The denial of that appl
was never appealed.

McDonnell appealed the decision of the district court to this Court, asserting that while the district court may have intended to place him in the position he was in prior to the enactment of Canyon County's 1979 Zoning Ordinance, the "C-2" classification provided for in the court's order failed to do so. McDonnell argues that under the judgment of the district court he must await a public hearing and approval by the commission prior to obtaining permission to build the mobile home park under "C-2," whereas the superceded ordinance would have allowed the building of a mobile home park as a matter of right.

The judgment on appeal entered by the district court on March 12, 1987, contained the following order in paragraph 5:

> 5. That the subject premises are given a classification of C2 under the Canyon County Zoning Ordinance approved and adopted on the date of September 6, 1979, which zoning classification is substantially the same as the prior zoning classification of C under the Canyon County Zoning Ordinance approved and adopted on the date of January 11, 1965.

That paragraph is inconsistent with the court having applied equitable estoppel because if equitable estoppel were to be applied the plaintiff would be entitled to a "C" classification of the nature which existed under the Canyon County Zoning Ordinance approved and adopted on January 11, 1965.

Accordingly, we affirm the judgment and decree of the district court in all respects except that paragraph 5 is hereby amended to read:

> 5. That the subject premises are given a classification of C under the Canyon County Zoning Ordinance approved and adopted on the date of January 11, 1965.

Since the district court's finding of equitable estoppel has not been questioned on appeal, we are not called upon to consider the application of our prior decision in Harrell v. City of Lewiston, 95 Idaho 243, 506 P.2d 470 (1973), and we do not rule upon whether equitable estoppel can appropriately be applied in future cases of this nature.

Costs to respondent; no attorney fees awarded.

BAKES, C.J., and BISTLINE, J., concur. SHEPARD, J., s
but did not participate due to his untimely death.

JOHNSON, J., concurring in the result.

I concur in the result reached in the lead opinion, but I wou
not reach that result on the basis of estoppel. In my view, t
1979 ordinance was invalid as to any zoning change
McDonnell's property, because it was adopted in violation
the statute providing for notice to property owners when zo
ing district boundary changes are made.

While the 1979 ordinance was styled as a new zoning
Canyon County, in fact, it was only an amendment of t
1965 ordinance. I.C. § 67-6511(b) (1975) provides that whe
the amendment of a zoning ordinance changes a zoning di
trict boundary, "notice shall be provided by mail to proper
owners and residents within the land being considered." Th
notice was not given, and the ordinance was therefore n
valid to change the zoning of McDonnell's property fro
commercial to agricultural.

**2. Order Denying Petition for Rehearing No. 16921, Reh. N
89RH-43.
with Addendum on Denial of the Petition for Rehearin
10-19-89.**

In the Supreme Court of the State of Idaho

RONALD McDONNELL, substituted for LEE RUWE,	)
	) ORDER DENYING
v.	) PETITION FOR
	) REHEARING
BOARD OF COUNTY COMMISSIONERS, CANYON COUNTY, IDAHO,	) NO. 16921
	) Reh. No. 89RH-43
Defendant-Respondent	)

The Appellant having filed a PETITION FOR REHEARING on August 24, 1989, and supporting BRIEF on September 7, 1989, of the Court's Opinion entered August 7, 1989; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is, DENIED and the Addendum on Denial of the Petition for Rehearing by Bistline, J., be, and hereby is, RELEASED.

DATED this 19th day of October, 1989.

By Order of the Supreme Court
ss: Lois Dawson
Frederick C. Lyon, Clerk
By Lois Dawson, Deputy Clerk

cc: Counsel of Record
District Court Clerk
District Judge Gerald L. Weston
Hon. Jim R. Doolittle, Adm. Judge

In the Supreme Court of the State of Idaho

RONALD McDONNELL, substituted for LEE RUWE.	)
Plaintiff-Appellant,	)
v.	) ON DENIAL OF APPELLANT'S PETITION FOR REHEARING
BOARD OF COUNTY COMMISSIONERS, CANYON COUNTY, IDAHO,	)
Defendant-Respondent	)

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. The Honorable Edward J. Lodge, District Judge.

Appendix D

BISTLINE, J., On Denial of Appellant's Petition fo
Rehearing.

One vote, standing alone, is never enough to grant a petitio
for rehearing, and for that reason I have not wasted my vot
However, both the parties and the district court in this cas
have properly brought an issue to the attention of this Cou
that deserves review.

Both parties have presented this Court with the same constitu
tional question, yet we have declined to address it. In fact, n
court that has had this case has decided whether the public no
tice given preceding the adoption of the 1979 Canyon Count
Zoning Ordinance satisfied the requirements of procedur
due process. The district court remanded this case to th
Planning and Zoning Commissioners, in order to allow th
Commissioners to hold hearings to determine whether th
public notice was sufficient. Subsequently the district court, i
reviewing the factual findings of the Commissioners, stoppe
short of commenting on the constitutional issue raised, be
cause contrary to the Commissioners the court found that th
notice given satisfied the relevant statutory notice provision
I.C. §§ 67-6509 and 67-6511. Moreover, the district court di
this without stating what specific provision of I.C. § 67
5215(g) it based its reversal of the Commissioner's findings o
fact.

On review, we placed Mr. McDonnell's property in the pos
tion it was in prior to the 1979 ordinance. We remained silen
on the question whether notice was constitutionally sufficien
However, Justice Johnson, while concurring in the result o
the case, did point out that public notice of the 1979 ordinanc
did not satisfy the requirements of I.C .§ 67-6511(b), whic
requires notice by mail.

Finally, the appellant's petition for rehearing also notes th
this Court misstates the facts of the case in note 2 of its opi
ion. No building permit was denied. Instead, Lee Ruwe w
told by the zoning commissioners when he applied that a co
ditional use permit under the 1979 ordinance was the appr
priate step. This combination of factors -- no clear stateme
by the district court why it held contrary to what th
Commissioners found, no statement by any court on the co
stitutional issues involved, more than one point of view
whether the public notice satisfied statutory requirements, a

a questionable grasp on the facts of the case by this Court -- leads me to want to rehear this case.

3. **Remittitur 10-19-89 sSating the Opinion Issued 8-7-89 Is Final.**

In the Supreme Court of the State of Idaho

RONALD McDONNELL, substituted for LEE RUWE,	)
	) NO. 16921
Plaintiff-Appellant,	)
	)
v.	) REMITTITUR
	)
BOARD OF COUNTY COMMISSIONERS, CANYON COUNTY, IDAHO,	)
	)
Defendant-Respondent	)

TO: THIRD JUDICIAL DISTRICT COURT, COUNTY OF CANYON.

The Court having announced its Opinion in this cause August 7, 1989, which has now become final; therefore,
IT IS HEREBY ORDERED that the District Court shall forthwith comply with the directive of the Opinion, if any action is required; and

IT IS FURTHER ORDERED that costs are allowed to Respondent. No attorney fees allowed.

DATED this 19th day of October, 1989.

ss: Lois Dawson
Lois Dawson, Deputy Clerk for
Frederick C. Lyon, Clerk
Clerk of the Supreme Court
STATE OF IDAHO

Frederick C. Lyon, Clerk of the Supreme Court, of the State
Idaho, do hereby certify that the above is a true and corre
copy of the Remittitur rendered in the above entitled caus
and now on record in my office.

WITNESS my hand and the Seal of this Court.
10-19-89
Frederick C. Lyon, Clerk
By: [unreadable]

Other Appended Material

1. **Applicant's Exhibit #3**
Affidavit of publication for public hearing held by Board of County Commissioners on proposed Canyon County Zoning Ordinance, dated 8-14-79.

LEGAL NOTICE

LEGAL NOTICE IS HEREBY GIVEN, that the Canyon County Board of Commissioners will hold a Public Hearing on the PROPOSED CANYON COUNTY ZONING ORDINANCE, Thursday, August 30, 1979, at 7:00 p.m., in the meeting room of the meeting room of the Canyon County Courthouse, 1115 Albany, Caldwell, Idaho.

The PROPOSED CANYON COUNTY ZONING ORDINANCE, Consists of written text and maps, copies of which are on file for inspection and review at the Canyon County Planning and Zoning office, 3rd Floor, Canyon County Courthouse, 1115 Albany, Caldwell, Idaho.

The Proposed Canyon County Zoning Ordinance sets forth the establishing of Land Use Classifications; the dividing the County into zones; Imposing regulations, prohibitions and restrictions for the promotion of health, safety, morals, convenience and welfare; governing the use of land for residential and non-residential purposes; regulating and limiting lot occupancy and the size of yards and other open spaces; adopting a map of said land use zones; prescribing procedures for changes of zone, Conditional Use Permits, variances, planned unit developments, flood control developments; repealing all ordinances and prescribing penalties for violations of said ordinances.

BOARD OF COUNTY COMMISSIONERS
GERALD L. JENSEN
Chairman

ATTEST:
BILL A. STAKER
Clerk
August 14, 1979

Appendix E

2. **Applicant's Exhibit #4**
Affidavit of publication for public hearing held by Board of County Commissioners for adoption of Impact Ordinance for the City of Nampa, dated 8-7-79.

NOTICE OF PUBLIC HEARING

NOTICE IS HEREBY GIVEN, that the Canyon County Board of County Commissioners will hold a Public Hearing on August 21, 1979, at 2:00 p.m., in the Canyon County Commissioners office, 3rd Floor, at 1115 Albany, Caldwell, Idaho.

The purpose of this hearing is to determine a geographical area of the City Impact for the City of Nampa, and designate by Ordinance, which Comprehensive Plan, Zoning Ordinance, and Subdivision Ordinance shall apply.

UNA DELL COLES
Chairman, Acting
Board of County Commissioners

ATTEST BY:
RUTH E. MILLER
Deputy
BILL A. STAKER
County Clerk
August 7, 1979

3. **Applicant's Exhibit #5**
Affidavit of publication for public hearing held by Board of County Commissioners on Nampa city impact Ordinance #79-007, dated 9-7-79.

ORDINANCE NO. 79-007

AN ORDINANCE DEFINING A GEOGRAPHICAL AREA OF CITY IMPACT: IDENTIFYING THE COMPREHENSIVE PLAN THAT SHALL APPLY WITHIN THE UNINCORPORATED PORTION OF CANYON COUNTY: IDENTIFYING THE ZONING AND SUBDIVISION ORDINANCES THAT SHALL APPLY WITHIN THE UNINCORPORATED PORTION OF CANYON COUNTY: AND ESTABLISHING AN

EFFECTIVE DATE PURSUANT TO SECTION 67-6
IDAHO CODE.

BE IT ORDAINED by the Board of County Commissio
of Canyon County, Idaho:

Section 1. PURPOSE
The purpose of establishing an area of city impact is to ide
fy a logical urban fringe area adjoining the City of Nam
Idaho. The urban fringe area is realizing, or will realize, de
opment pressure that must be planned for in an orderly m
ner. Section 67-6526, **Idaho Code**, requires that cities
counties negotiate an area of city impact.

Section 2. CONSIDERATION
The following factors were considered in the establishmen
an area of city impact:

1. Trade area;
2. Geographic factors; and
3. Areas that can reasonably be expected to be annexe
city in the future.

Section 3. GEOGRAPHIC AREA OF CITY IMPACT
The officially adopted geographic area of city impact is sh
on the attached map entitled, "Area of City Impact for Nam
Idaho."

Section 4. COMPREHENSIVE PLAN
The comprehensive plans and subsequent amendments the
as officially adopted by Canyon County and Nampa, Ida
shall apply to the area of city impact within the unincorpo
ed area of Canyon County, Idaho.

No use shall be permitted which is not in conformance v
the adopted City and County Comprehensive Plans.

Amendments to the City Comprehensive Plan affecting
area of city impact shall require the approval of the Can
County Planning and Zoning Commission.

Section 5. ZONING ORDINANCES AND LAND USE
The zoning ordinances, zoning map and subsequent amendments thereto as officially adopted by Canyon County, Idaho, shall apply to the area of city impact within unincorporated area of Canyon County, Idaho.

Rezone requests, conditional use permits, variance and vacations within the area of city impact shall require the approval of the City Planning and Zoning Commission and the Canyon County Planning and Zoning Commission.

Master street plans adopted by the City shall be adhered to.

Mobile homes on individual lots in the area of city impact shall be allowed in the R-2T Zone unless approved otherwise by the City Planning and Zoning Commission and Canyon County Planning and Zoning Commission.

Section 6. SUBDIVISION ORDINANCE
The subdivision ordinance and subsequent amendments thereto as officially adopted by the City of Nampa, Idaho, in accordance with Section 50-1306, **Idaho Code**, shall apply to the area of city impact within the unincorporated area of Canyon County, Idaho.

Section 7. EFFECTIVE DATE
The Ordinance shall be in force and effect the 25th day of August, 1979.

Passed by the Board August 21, 1979.
Effective date August 25, 1979.

GERALD L. JENSEN
Commissioner
UNA DELL COLES
Commissioner
ATTEST:
BILL A. STAKER
County Recorder
RUTH E. MILLER
Deputy
September 7, 1979

4. Applicant's Exhibit #6
Affidavit of publication for public hearing held by Canyo County Planning and Zoning Commission on propose Canyon County Zoning Ordinance, dated 7-9-79.

NOTICE OF HEARING

PUBLIC NOTICE IS HEREBY GIVEN THAT A PUBLI HEARING will be held by the Canyon County Planning ar Zoning Commission on the PROPOSED CANYO COUNTY ZONING ORDINANCE, Wednesday, July 25t 1979, at 8:00 P.M., in the meeting room of the Canyo County Courthouse, 1115 Albany, Caldwell, Idaho.

The PROPOSED CANYON COUNTY ZONIN ORDINANCE, CONSISTS of written text and Maps copies which are on file for inspection and review at the Canyo County Planning and Zoning office, 3rd floor, Canyon Coun Courthouse, 1115 Albany, Caldwell, Idaho.

The Proposed Canyon County Zoning Ordinance sets forth th establishing of Land Use Classifications; the dividing th County into zones; imposing regulations, prohibitions and r strictions for the promotion of health, safety, morals, conv nience and welfare; governing the use of land for residenti and nonresidential purposes; regulating and limiting lot occu pancy and the size of yards and other open spaces; adopting map of said land use zones; prescribing procedures for chan es of zone, Conditional Use Permits, variances, planned un developments, flood control developments; repealing all ord nances and parts of ordinances in conflict herewith and pr scribing penalties for violations of said ordinance.

Notice is further given that written testimony on the Propos Canyon County Zoning Ordinance will be accepted at t Canyon County Courthouse, Planning and Zoning Office, 3 floor, Canyon County Courthouse, 1115 Albany, Caldwe Idaho, for one week following said hearing.

Charles Banks
Chairman
Canyon County Planning
And Zoning Commission
July 9, 1979

5. Affidavit of George Ottens in Support of Motion to Remand.

RICHARD L. HARRIS
CANYON COUNTY PROSECUTING ATTORNEY
Canyon County Courthouse
Post Office Box 668
Caldwell, Idaho 83606-0668
Telephone: (208) 454-7391

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

RONALD McDONNELL, Plaintiff, vs. BOARD OF COUNTY COMMISSIONERS, Canyon County, Idaho, Defendant.	)))) CASE NO. L-36760) AFFIDAVIT OF) GEORGE A. OTTENS) IN SUPPORT OF THE) COUNTY'S MOTION) TO REMAND))
STATE OF IDAHO County of Canyon	)) ss.)

GEORGE A. OTTENS, being duly sworn upon oath, deposes and says:

1. That he is the Canyon County Planning & Zoning Administrator and has been the Canyon County Planning & Zoning Administrator at all times pertinent to the above entitled action, including the times in 1979 when the present Canyon County Zoning Ordinance was being considered at a Planning & Zoning Commission hearing and a Board of County Commissioner's hearing.

2. That he is familiar with the Board of Cou
Commissioners' hearing in the above entitled matter, w
took place on January 26, 1984. That he was present du
the said hearing in his official capacity as Zon
Administrator.

3. That prior to the Commissioners' hearing on January
1984, your affiant had no knowledge that the applicant,
Ruwe, intended to present evidence that the notice of the
sage of the 1979 zoning ordinance was allegedly defectiv
failure to comply with Idaho Code, Section 67-6511.

4. That in considering the 1979 zoning ordinance, Can
County officials held two public hearings, as enumer
below:

a. That a Planning & Zoning Commission hearing was hel
July 25, 1979, and said hearing was advertised in the Id
Free Press and the Idaho News Tribune on July 9, 1979;

b. That a Commissioners' hearing was held on August
1979, and said hearing was advertised in the Idaho Free P
and the Idaho News Tribune on August 14, 1979.

5. That on or about July 16, 1979, your affiant personally
livered to KCID Radio in Caldwell, Idaho, a legal notice
the County Commissioners were going to hold a public h
ing considering the Canyon County Zoning Ordinance
copy of said notice is attached to this Affidavit as Exhibit
and by this reference incorporated herein. Also, attache
this Affidavit as Exhibit "B" and by reference incorpor
herein, is a cover letter addressed to KCID Radio, which
companied Exhibit "A" of this Affidavit.

6. That on or about July 16, 1979, your affiant personally
lievered to the offices of KIVI Television Station in Na
Idaho a copy of Exhibit "A" of this Affidavit. Also, attac
to this Affidavit as Exhibit "C" and by this reference inco
rated herein is a cover letter to KIVI Television Station, w
accompanied Exhibit "A" of this Affidavit.

7. That your affiant presented Exhibits "A," "B" and "C
KCID Radio and KIVI Television in an effort to make a

able a broadcast-media notice of the consideration of the proposed Planning & Zoning ordinance for Canyon County. That both KCID Radio and KIVI Television are broadcast media organizations located in Canyon County.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

George A. Ottens

SUBSCRIBED AND SWORN TO Before me this _____ day of June, 19895 [sic].

Notary Public for Idaho
Residing at Caldwell, Idaho

EXHIBIT 'A'

CANYON COUNTY
Caldwell, Idaho 83605

LEGAL NOTICE

LEGAL NOTICE IS HEREBY GIVEN, that the Canyon County Board of Commissioners will hold a Public Hearing on the PROPOSED CANYON COUNTY ZONING ORDINANCE, Thursday, August 30, 1979, at 7:00 p.m., in the meeting room of the Canyon County Courthouse, 1115 Albany, Caldwell, Idaho.

The PROPOSED CANYON COUNTY ZONING ORDINANCE, Consists of written text and maps, copies of which are on file for inspection and review at the Canyon County Planning and Zoning office, 3rd Floor, Canyon County Courthouse, 1115 Albany, Caldwell, Idaho.

The Proposed Canyon County Zoning Ordinance sets forth the establishing of Land Use Classifications; the dividing the County into zones; imposing regulations, prohibitions and restrictions for the promotion of health, safety, morals, convenience and welfare; governing the use of land for residential and nonresidential purposes; regulating and limiting lot occupancy and the size of yards and other open spaces; adopting a map of said land use zones; prescribing

procedures for changes of zone, Conditional Use Permits, variances, planned unit developments flood control developments; repealing all ordinances and prescribing penalties for violations of said ordinance.

EXHIBIT 'B'

CANYON COUNTY
Caldwell, Idaho 83605
July 16, 1979

K.C.I.D.
921 Cleveland
Caldwell, Ida
83605

Dear Sir;
The Canyon County Planning and Zoning Commission would appreciate very much if you would announce the enclosed Notice of Public Hearing, as a Public Service. Thank you.

ss: George A. Ottens
Administrator
Canyon County
Planning & Zoning

EXHIBIT 'C'

CANYON COUNTY
Caldwell, Idaho 83605
July 16, 1979

K.I.V.I. 6

Dear Sir;
The Canyon County Planning and Zoning Commission would appreciate very much, if you would announce the enclosed Notice of Public Hearing, as a Public Service. Thank you.

ss: George A. Ottens
Administrator
Canyon County
Planning & Zoning

6. County Remand Exhibit #3
Minutes of Planning and Zoning Commission hearing 7-25-79.

CANYON COUNTY PLANNING AND ZONING
ADMINISTRATION
JULY 25, 1979
PROPOSED ZONING ORDINANCE

MEMBERS PRESENT:	Charles Banks	Lloyd Bowen
	Vernon Greenfield	Robert Robinson
	Fred Houston	Dick Winder
	Marguerite Brown	
MEMBERS ABSENT:	Julie Hyslop	Basil Drew
	Ray Abbott	Marilyn Bauman
	Carl Chase	
OTHERS PRESENT:	George A. Ottens, Administrator	
	Stan Pilcher, County Commissioner	
	Gerald Jensen, County Commissioner	
	Sam Lang, News Tribune	
	Approximately 40 others	

Chairman Charles Banks called to order the Canyon County Planning and Zoning Meeting at 8:00 p.m., in the Canyon County Courthouse, meeting room, 1st Floor, at 1115 Albany, Caldwell, Idaho.

Mr. Paul Jauregui was present, representing the Idaho Power Company, and stated that the Company has looked through the proposed Zoning Ordinance and has some concern which deals primarily in three portions. 1) The Conditional Use which appears to be the Public Utilities Facilities to be classified a Conditional Use in many of the zones. 2) The possibility of a height limitation problem and the effect that may have on construction on Public Utilities facilities and other structure, and 3) The definition of what Public Utility Facilities are. I may present more comments in writing suggesting possibly some areas we have. The Conditional Use, problems we see, is that we are not at the Public Utility Facility which we have to assume include Conditional Use its zones. If they are proposed to be Conditional Use Permits we suggest that they not

be since it is necessary for structure and buildings to be constructed in these zones.

Another problem on page four (4), under Height Regulations. It speaks to any residential building or structure or portion thereof. Does residential refer to residential building, residential structures or residential building only or residential structures only? These are the questions Idaho Power Company has.

Mr. Dennis King, JUB Engineers, representing Blakely, Alpha and Davenport Engineers, stated that the purpose of review is to provide suggestions to Canyon County relating to the technical aspects. We have attempted not to make any changes which would effect any apparent policies. Some major items are as follows:

It has been suggested that in the "A"-40 zones Planned Unit Developments be allowed, as a Conditional Use Permit. This would allows development of nonagricultural areas which will be designated on the maps as under that use. This would give at least an opportunity for that type of use to occur.

In the area requirements as listed we have made some suggested changes there, more to provide as density changes in development to different district designation. Rural Residential Zone 12,000 has not been changed, however, in the R-1 Zone basically all of the other R zones those were listed with a minimem[sic] lot size of 8,500 sq. ft. to allow higher density in the areas., for instance the City of Nampa will allow extensions of there municipal sewer and water facilities into the unincorporated areas, within the Impact Area. So in order to provide for the proper planning as these areas are eventually annexed.

Area Requirements page five (5) Section 5-B re-word to one division of a lot is permitted provided minimum lot sizes for both parcels is in conformance with requirements of the local health district.

We suggested that possibly municipal setbacks requirements could be utilized in the area of City Impact, and again we suggest that Planned Unit Developments be allowed in all R

Districts, as an allowable use instead of a Conditional Use.

There should also be adjustments in setbacks in the districts. They are not consistent. Some are 7, 10 etc. Suggest more consistency.

The height requirements may cause some problems in some areas for instance in M-2 or Heavy Industrial zones, the ordinance restricts it to 5 stories, maybe because of fire protection. Therefore, in the Heavy Industrial Zone don't see any reason for height limitation.

It has also been suggested that "H"-Holding Zone be eliminated completely. There is no need for a Holding Zone if a certain piece of property is not appropriate to be rezoned for a certain use, it just should'nt [sic] be zoned.

Page 38 Section L & M, delete the sentence, in excess of one thousand (1000) sq. ft.

Section 3.4 Planned Unit Development - All items beyond and including Item 13 should not be included in the Zoning Ordinance. These items speak entirely to the technical and design requirements for a Planned Unit Development. This should be included in the Subdivision Ordinance.

Mr. Dennis King also stated that the preparation of maps, as I understand, the maps are being prepared and zoning will occur upon the adoption of the maps so all the land will be zoned in accordance with the Comprehensive Plan. To me that is backwards. I feel that land should be zoned for the present use, and then as the need arises the owner should then submit for a zone change, and if it's in accordance with the Comprehensive Plan, there should be no problem.

I would term what is being done now as blanket zoning. From a personal standpoint I live in the Shalimar Terrace Subdivision and I am very concerned of what's going to happen to adjacent land. I don't want just anything to go into development. It's understood this is planned for residential use at a future date but I want to have personal right to discuss the particular project so that I am protected as a property owner.

Mr. Agenbroad stated that he owns land south of Nampa and a portion of the land that they have atttempted to farm is quite marginal, and basically his intent is a Planned Unit Development type of Planning. There have been several parties interested in putting in a golf course here and there is a need for a golf course and this would also mean development around the area.

Commission member Winder stated that the Comprehensive Plan is the basis for zoning. This area is in the "A"-40 designation.

Mr. Ottens stated that although this is in the "A"-40 zone, under a Conditional Use Permit a golf course or Planned Unit Development can be allowed.

Mr. Mike Preston, representing Mr. Bob Struve, of Canyon Development Company, stated I would like to speak on a subject the board might like to consider to add to the ordinance that might solve some of the problems that some people have expressed regarding which land can be developed, which land can't be developed, etc.

Refering to the "A"-40 zone area in which most of it is prime agriculture land, the board might want to consider to revise the Comprehensive Plan once allowing marginal land development rights. A written explanation will be submitted.

Mr. Jack Williamson stated in the ordinance it states, signs should be setback 40 feet from the Right-of-Way. There are trees planted closer to the highway and 7 to 8 hundred trucks deliver every year in this area. If there were no signs they would'nt [sic] be able to find the Orchards.

Mr. Bob Struve stated many areas of the County is [sic] not suitable for agriculture farming and to lock it up forever where it cannot be used in some matter is a mistake. I urge that an ordinance be provided some capability by application of the owner of land request for some specifying use and I have had some regards to Planned Unit Developments, and it provides to give open areas to crowd people in as long as there is agriculture surroundings. Everyone has the privilage[sic] to live in the County or City. Also the sign section should be deleted

from the ordinance.

Mr. Jack Hockberger also agreed that the sign section should be deleted from the ordinance. Also page 32 Section 1.19 is rather vague in general and should be worded over in drafting for better intent.

Mr. Dale Hobsa stated this has been advertised as a Zoning Ordinance Public Hearing and with the sign regulation involved, the sign section should be deleted or a separate Public Hearing should be held. This is an entirely different subject from zoning and none of the persons interested in the sign section are present tonight.

In relation between city and county Impact Zone, 6,000 sq. ft. and county 8,500 sq. ft., will filing fees have to be filed with city and county?

Mr. Hobsa then stated that as far as mobile home limitations, the board no longer has the ability to zone areas for Mobile Homes in limited areas as before. There are numerous supreme court rulings. We are zoning and have required in the State of Idaho that exist only because they have not be challenged. We are rulled [sic] in the state only because nobody will go through the expense to challenge decisions through the courts and bring up to date what is happening elsewhere. The volume of Conditional Use Permit applications that exist could be very time consuming and I would like the commission to take some position that at such time the volume reached a certain amount that they would hold more frequent meetings and possibly another time except evenings. Under the Conditional Use Permits thrre[sic] whould[sic] be some extra consideration.

APPROVED BY:
s. Charles C. Banks
Charles Banks, Chairman
s. Julie J. Hyslop
Julie Hyslop, Secretary

7. Objections to and Request for Corrections and Additions to Clerk's Record 8-21-87.

KENNETH F. WHITE Chartered
Attorney at Law
703 Second Street South
P. O. Box 1099
Nampa, ID 83653-1099
Telephone: (208) 466-3100

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

RONALD McDONNELL, substituted for LEE RUWE,	)
Plaintiff,	) Case No. L-36760
vs.	)
BOARD OF COUNTY COMMISSIONERS, Canyon County, Idaho,	) OBJECTION TO AND) REQUEST FOR) CORRECTIONS &) ADDITIONS TO THE) CLERK'S RECORD
Defendant.	)

COMES NOW, the above-named plaintiff by and through his counsel of record, Kenneth F. White, and hereby moves the court for an order correcting and making additions to the clerk's record as follows:

I.

States Exhibit #1 is missing from the Commissioners record and the minutes of the Planning & Zoning meeting held November 2, 1983 and which was used by the Hearings Officer, Fred Kelly Grant, as part of the record.

II.

The applicant's Exhibit #10 is missing from the clerk's record, found on page 9 through 17 of the clerk's record.

III.

Plaintiff objects to someone tampering with the record on page 4 of 5 of the Resolution of the Canyon County Planning & Zoning Commission paragraph IV by marking through the T and the Y of the word property thereby changing the intent and meaning of said paragraph IV. (page 21 of the court transcript record).

IV.

The transcript of the Board of Commissioner's hearing dated January 26, 1984, ordered by Judge Roger Williams on the 10th day of July, 1984, which said orders on said page 33 of the Clerk's record, is missing.

V.

The order disqualifying the Honorable Judge Goff as well as the order assigning the case to Judge Lodge are missing from the clerk's record.

VI.

The signature of commissioner Joyce M. Chase on the document on page 99 of the clerk's record has been inserted after the minutes of the Board of Commissioners of September 6, 1985 were made part of the record in this matter.

VII.

Joint Exhibits "A" and "B" were in fact marked and admitted as evidence, and plaintiff's object to the clerk's record stating that they were never offered. Said joint exhibits, which were Canyon County Zoning Ordinance and a copy of the comprehensive plan were offered and the county made no objection on page 23 and 24 of the reporter's transcript. (See also pg. 157 clerk's record)

VIII.

A file folder containing newspaper articles was offered, and plaintiff's object to the clerk's record stating that they were never offered, as the same were offered on page 16 line 15 of

the court reporter's transcript at the hearing on the Motion to Remand, held May 28, 1985, and no objection was voiced.

IX.

The clerk's record refers to plaintiff's exhibit "C" admitted during the remand hearing as a "portion of transcript from Planning & Zoning hearing when in fact it is a portion of the transcript from the County Board of Commissioners, dated January 26, 1984.

X.

The clerk's record on County Exhibits [sic] #3 is referred to as proposed zoning ordinance, when in fact County remand exhibit #3 was actually minutes of the Planning & Zoning Commission dated July 25, 1979.

XI.

Plaintiff's object to the zoning maps being excluded as part of the clerk's record. The county exhibit #6 was admitted on page 21 of the remand hearing transcript held July 31, 1985 and plaintiff's demand that said county zoning maps be made part of the record.

These objections and requests and demands are made pursuant to Rule 29 and 31 of the Idaho Appellate Rules.

DATED this 21 day of August, 1987.

KENNETH F. WHITE
Attorney for Plaintiff's

CERTIFICATE OF MAILING

I certify on this 21st day of August, 1987, I placed in the U.S. Mail, at Nampa, Idaho, postage prepaid, a copy of the foregoing instrument addressed to the following person, at the following address.

Richard L. Harris
Canyon County Prosecuting Attorney

P.O. Bos 668
Caldwell, Id. 83606-0668

Kenneth F. White

8. Court Minutes, Third District Court, 9-8-87.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO,
IN AND FOR THE COUNTY OF CANYON

PRESIDING: HONORABLE EDWARD J. LODGE
SEPTEMBER 8, 1987
COURT MINUTES

RONALD McDONNELL, substituted for LEE RUWE,	)
Plaintiff and Appellant,	) Case No. L-36760
-vs-	)
	) Supreme Court No. 16921
BOARD OF COUNTY COMMISSIONERS, CANYON COUNTY, IDAHO,	)
Defendant and REspondent.	)

This having been the time for a hearing on the plaintiff's objection to and Request for corrections and additons[sic] to the clerk's record on an appeal to the Supreme Court, Mr. Kenneth F. White was present as counsl[sic] for the plaintiffs and Mr. Charles Saari was present as counsel for the defendants.

The Court noted that counsel had met in Chambers and gone over the objections and reached a solution to each one which they would state on the record at this time.

Mr. White stated that as to objection #1, that State's exhibit 1 has been located and will be sent with the exhibits to the Supreme Court. As to objection #2, that exhibit has also been located and will added [sic] to the Clerk's record. As to objection #3, an objection to leters[sic] having been slashed, there has been no determination as to who placed those slashes through those letters. There will be no change made per this objection and Mr. White can argue that matter in the Supreme Court. As to objection #4, that transcript will be added as an exhibit to the Supreme Court. As to objection #5, that order will be added to the record. As to objection #6, the Court ruled that because the copy of the document in the Court record has the signature of Joyce Chase on it, that is what will be setn[sic] in the Clerk's record. As to ojbection[sic] #7 the Court reviewed the transcript and instructed the Clerk at this time to mark those exhibits as admitted and show them as admitted in the documents to the Supreme Court. As to objection #8 the Court ruled trhat[sic] those exhibits can be sent to the Supreme Court but the record will stand as to whether or not they were admitted into evidence. As to objection #9, the Clerk was instructed to place the entire title of the document on the Exhibit Certificate to clarify to the Supreme Court exactly what the exhibit consists of. As to objection #10, the Clerk was also instructed to show to entire title of this document in the Certificate of exhibits. As to objection #11 the Court instructed the Clerk to try and locate the maps that were used in the hearings and determine whether they or copies of them could be sent to the Supreme Court.

Mr. White stated he had no objection to copies being substituted instead of the original maps.

Mr. Saari concurred with the statement of the solution to the objections.

The Court ordered that the amendments, corrections and additions be done as stated in open Court for purposes of the appeal documents to the Supreme Court.

s. M. Macho
Deputy Clerk

9. Letter from Clerk of Third District Court to Frederick C. Lyons, Clerk of Idaho Supreme Court 10-15-87.

Canyon County
CLERK
1115 Albany
Caldwell, Idaho 83605

October 15, 1987

Mr. Frederick C. Lyons
Clerk of the Supreme Court
451 W. State Street
Boise, Idaho 83720

RE: McDonnell -vs- Canyon County Commissioner
Supreme Court No. 16921

Dear Mr. Lyons,

I am sending the corrected Clerk's record and the Reporter's transcript on appeal in the above referenced case today. The only correction I could not make pursuant to Mr. White's objection was to locate and include with this appeal the maps which were County exhibit #6. According to the information I have received concerning those maps, they are the original maps used in the Planning and Zoning office. There are no copies of them and Planning and Zoning do not want the maps to leave their office as it would leave them none to work with. They have stated they would let the maps out of the office for a period of one hour in order to have them copied. However, the reason there is no copy of them is because of the economic problem in having that done. Mr. Ottens who worked for Planning and Zoning at the time of the hearings has died and the girl in charge of the office has moved to Guam.

If there are any questions concerning this matter, feel free to call me at 454-7589.

I am mailing the corrections to the Clerk's Record to counsel of record today also.

Thank you.

Sincerely,
s. M. Macho
M. Macho, deputy clerk

cc: Kenneth F. White
Richard L. Harris

10. Motion to Compel 10-27-87.

KENNETH F. WHITE, Chartered
Attorney at Law
703 Second Street South
P. O. Box 1099
Nampa, ID 83653-1099
Telephone (208)466-3100

IN THE SUPREME COURT OF THE STATE OF IDAHO

RONALD McDONNELL,	)
	)
Plaintiff-Appellant,	) Case No. 36760
	)
vs.	)
	) MOTION
THE BOARD OF COUNTY COMMISSIONERS,	)
	)
	)
Defendant-Respondant.	)

COMES NOW the Plaintiff-Appellant in the above entitled matter and hereby moves this Court for an Order compelling the Third District Court Clerk, the Canyon County Board of Commissioners, and the Canyone County Planning and Zoning Commission to produce the maps that were in fact admitted into evidence at the Canyon County Remand Hearing held the 31st day of July, 1985 in this matter.

DATED this 27th day of October, 1987.

s. Kenneth F. White
Attorney for
Plaintiff-Appellant

CERTIFICATE OF MAILING

I certify on this 27th day of October, 1987, I placed in the U. S. Mail, at Nampa, Idaho, postage prepaid, a copy of the foregoing instrument addressed to the following person, at the following address.

Richard L. Harris
Prosecuting Attorney
Canyon County Courthouse
Caldwell, ID 83605

ATTORNEY GENERAL
Jim Jones
Statehouse Mail
Boise, ID 83720

s. Kenneth F. White

Appendix E

11. Supporting Affidavit, Motion to Compel.

KENNETH F. WHITE, Chartered
Attorney at Law
703 Second Street South
P. O. Box 1099
Nampa, ID 83653-1099
Telephone (208)466-3100

IN THE SUPREME COURT OF THE STATE OF IDAHO

RONALD McDONNELL,	
Plaintiff Appellant,	Case No. 16921
vs.	AFFIDAVIT IN SUPPORT OF MOTION
THE BOARD OF COUNTY COMMISSIONERS,	
Defendant-Respondent.	

County of Canyon)
: ss.
STATE OF IDAHO)

COMES NOW Plaintiff-Appellant RONALD McDONNELL in the above entitled matter, after being first duly sworn, deposes and says:

That your affiant was personally present during the County remand hearing by the Board of County Commissioners, which hearing was held July 31, 1985. That certain maps were admitted into evidence at said remand hearing. The admission of those maps is referred to on Page 20 and 21 of the Transcript of the Remand Hearing of the Board of County Commissioners held on July 31, 1985.

That the following morning your affiant was in the Canyon County Commissioners' office and specifically requested one Jackie Germaine to produce the maps so that

your affiant and his wife could view the same. There were approximately four to seven, possibly eight maps, these maps were each one covering a portion of Canyon County and the maps covered the entire Canyon County area.

Your affiant was interested only in the map which pertained to the area where your affiant's real estate was located. On the said map pertaining to your affiant's property, there was a black felt-tip marker drawing placed upon the said map by someone indicating an interchange from the freeway directly to your affiant's property.

Subsequent to your affiant's Motion to Compell[sic] the Admission of all Exhibits and Correction of the Record for this appeal, your affiant has been in the Planning and Zoning Commission attempting to locate said maps, and the maps indicated by the Planning and Zoning Commission to be the identical maps are not the same maps your affiant saw in the Canyon County Commissioners' office on August 1, 1985, the day after the Hearing at which time said maps were admitted into the record.

That your affiant justly believes that the said maps that your affiant saw in the Canyon County Commissioners' office on August 1, 1985, clearly demonstrates that the reason for the down-zoning of your affiant's property was to hold the Interstate interchange corridor open so as to prevent the establishment of businesses within said area.

WHEREFORE: Your Affiant prays that an Order issue from this Court Ordering the District Court and/or the Canyon County Commissioners or the Canyon County Planning and Zoning Commission to produce the exact same maps that were admitted into evidence at the Canyon County Remand Hearing on July 31, 1985. Said maps are a vital and important part of this Appeal, as said maps were the maps used prior to the passage of the 1979 Zoning Ordinance in Canyon County, Idaho, and the maps now on the wall in the Planning and Zoning Commission of Canyon County, Idaho, are dated September 6 of 1979, and are not the same maps.

Further your affiant sayeth not.

DATED this 27th day of October, 1987.

s. RONALD McDONNELL

County of Canyon)
: ss.
STATE OF IDAHO)

On 27th day of October, 1987, before me, the undersigned, a Notary Public in and for said State, personally appeared RONALD McDONNELL, known to me to be the person whose name are subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first written above.

.ss
KENNETH F. WHITE
NOTARY PUBLIC FOR IDAHO
Residing at Nampa, Idaho

12. Letter of Transmittal from Clerk, Third District Court 1-14-88.

Canyon County
Clerk
1115 Albany
Caldwell, Idaho 83605

January 14, 1988

Mr. Fredereick[sic] C. Lyon
Clerk of the Supreme Court
451 W. State Street
Boise, Idaho 83720

Dear Mr. Lyon:

I am sending an exhibit in the case of McLDonnell [sic] -vs- Board of County Commissioners, our case number I. 36760 and Supreme Court case num er 16921.

This was the remand exhibit #6 which had been missing at the time the transcript on appeal was mailed to you. At the time Judge Lodge cleaned out his office to make his move to the Federal Court, this exhibit was found in his office.

Both of counsel have advised that the exhibit has been found and that it is being sent to you to be used in the appeal.

Thank you,

ss. M. Macho,
deputy clerk

cc: Kenneth F. White
Charles Saari

SUPPLEMENTAL CERTIFICATE OF EXHIBIT

I, BILL A. STAKER, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the county of Canyon, do hereby certify that the following exhibit is the original Remand County Exhibit #6 that was used in

the hearings in the case of Ronald McDonnell -vs- Board of County Commissioners, civil case no. L 36760.

Remand Exhibit #6 Maps Admitted

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 14th day of January, 1988.

BILL A. STAKER, Clerk of the district
Court of the Third Judicial District
of the State of Idaho, in and for the
County of Canyon

By: M. Macho, Deputy

13. Order Granting Motion to Augment Appeal Record 1-18-88.

In the Supreme Court of the State of Idaho

RONALD McDONNELL, substituted for LEE RUWE,	)	
Plaintiff-Appellant,	)	ORDER GRANTING MOTION TO AUGMENT APPEAL RECORD
-vs-	)	
BOARD OF COUNTY COMMISSIONERS, CANYON COUNTY, IDAHO,	)	NO. 16921
Defendant-Respondent.	)	

The Appellant having filed a MOTION on December 23, 1987, to augment the Appeal Record with a map admitted into evidence in the District Court as Exhibit #6 which was not sent to this Court at the time the Appeal Record was filed; no Objection being filed thereto; therefore, good cause appearing.

IT IS HEREBY ORDERED that the MOTION to augment the appeal Record be, and hereby is, GRANTED.

IT IS FURTHER ORDERED that the map identified as Remand Exhibit #6 received from the District Court Clerk shall be filed with the Exhibits previously received.

Dated this 18th day of January, 1988.

For the Supreme Court
ss.
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Gerald Weston

Adm. Judge Jim R. Doolittle

IDAHO SUPREME COURT
IDAHO COURT OF APPEALS
OFFICE OF THE CLERK OF COURTS
JANUARY 18, 1988

KENNETH F. WHITE
PO BOX 1099
NAMPA, ID 83651

AUGMENTATION FILED - RESPONDENT BRIEF(s) DUE

DOCKET-NO. (APP) MC DONNELL, RONALD
16921 (RES) CANYON COUNTY BRD OF COMMISSIONERS

An AUGMENTATION OF THE APPEAL RECORD for the above-entitled appeal was filed in this office on this date.

The RESPONDENT BRIEF(s) must be filed by FEBRUARY 16, 1988.

cc: ALL COUNSEL

SINCERELY,
FREDERICK C. LYON
CLERK OF THE COURTS
A-1786 DEH 045/42 16:58:57

CLERK OF THE COURTS
IDAHO SUPREME COURT BUILDING
451 WEST STATE STREET
BOISE, ID 83720
TELEPHONE: 334-2210

14. Motion to Augment Record 2-23-88.

KENNETH F. WHITE Chartered
Attorney at Law
703 Second Street South
P. O. Box 1099
Nampa, ID 83653-1099
Telephone (208)466-3100

In the Supreme Court of the State of Idaho

RONALD McDONNELL, substituted for Lee Ruwe,	
Plaintiff and Appellant,	Supreme Court No. 16921
vs.	
BOARD OF COUNTY COMMISSIONERS, CANYON COUNTY, IDAHO,	MOTION TO AUGMENT THE RECORD
Defendant and Respondent.	

COMES NOW, the Appellent, by and through his counsel of record, and pursuant to Rule 30 and 30.1 of the Idaho Appellate Rules, moves this court to augment the record submitted to this court by having the court consider the documents attached to this Motion which were part of the record, but which the Appellant can not find lodged with the Clerk of the Supreme Court.

The Appellant further objects to certian[sic] maps being placed in the Supreme Court Record and represented as being Exhibit No. Six (6) of the Remand Hearing, on the grounds and for the reason that said maps are in fact not the actual maps that were admitted into evidence.

The Appellent further objects to the Motion to Augment, filed by the Defendant Respondent on the grounds and for the reasons that the maps contained in the packet part of Joint Exhibits "A" and "B", was not included in the original Joint

Exhibits "A" and "B".

Wherefore, the Appellant requests an opportunity to augment and settle the record before the Trial Court, or such other trial court as is assigned to take the place of the Honorable Edward J. Lodge, in this matter.

Dated this 23rd Day of February, 1988.

ss.
KENNETH F. WHITE

CERTIFICATE OF MAILING

I certify on this 23rd day of February, 1988, I placed in the U. S. Mail, at Nampa, Idaho, postage prepaid, a copy of the foregoing instrument addressed to the following person, at the following address.

Charles A. Sarri
Deputy Prosecuting Attorney
Board of County Commissioners,
Canyon County Courthouse
Caldwell, Idaho 83605

ss.
KENNETH F. WHITE

15. Denial of Motion to Augment 3-31-88.

In the Supreme Court of the State of Idaho

RONALD McDONNELL, substituted for LEE RUWE,	)	
Plaintiff-Appellant,	)	ORDER DENYING MOTIONS TO
vs.	)	AUGMENT RECORD
BOARD OF COUNTY COMMISSIONERS, CANYON COUNTY, IDAHO,	)	NO. 16921
Defendant-Respondent.	)	Ref. No. 87S-202

The Respondent having filed a MOTION TO AUGMENT THE RECORD and supporting AFFIDAVIT on February 16, 1988; a MOTION TO AUGMENT THE RECORD having been filed February 24, 1988, by Appellant; the Respondent having filed and OBJECTION TO APPELLANT'S MOTION TO AUGMENT THE RECORD on March 14, 1988; the Court being fully advised; therefore, after due consideration,

IT IS HEREBY ORDERED that the MOTION TO AUGMENT THE RECORD by respondent and the MOTION TO AUGMENT THE RECORD by appellant be, and hereby are, DENIED.

DATED this 31st day of March, 1988.

By Order of the Supreme Court
ss.
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Gerald Weston
Administrative Judge Jim R. Doolittle

IDAHO SUPREME COURT

IDAHO COURT OF APPEALS
OFFICE OF THE CLERK OF COURTS
APRIL 1, 1988

KENNETH F. WHITE
PO BOX 1099
NAMPA, ID 83651

MOTION/PETITION DECIDED: APPELLANT REPLY BRIEF DUE

DOCKET-NO. (APP) MC DONNELL, RONALD
16921 (RES) CANYON COUNTY BRD OF COMMISSIONERS

The pending MOTION/PETITION in the above-entitled matter has now been decided and an ORDER entered (see enclosed copy of Order/Notice).

The APPELLANT REPLY BRIEF(s) must be filed by APRIL 21, 1988.

SINCERELY,
FREDERICK C. LYON
CLERK OF THE COURTS
A-1786 LD 007/38 10:39:22

CLERK OF THE COURTS
IDAHO SUPREME COURT BUILDING
451 WEST STATE STREET
BOISE, ID 83720
TELEPHONE: 334-2210

16. Motion to Release Exhibit 6-26-89.

rm

RICHARD L. HARRIS
CANYON COUNTY PROSECUTING ATTORNEY
Canyon County Courthouse
Post Office Box 668
Caldwell, Idaho 83606-0668
Telephone: (208)454-7391

In the Supreme Court of the State of Idaho

RONALD McDONNELL, substituted for Lee Ruwe,	)	
Plaintiff/Appellant,	)	CASE NO. 16921
v.	)	**MOTION TO RELEASE EXHIBIT AND ORDER**
BOARD OF COUNTY COMMISSIONERS, CANYON COUNTY, IDAHO,	)	
Defendants/Respondents.	)	

COMES NOW, the Board of County Commissioners, Canyon County, Idaho, Defendants/Respondents, and moves this Court pursuant to **I.A.R.** 31.1, for its order permitting the release of County Exhibit "6" to the care, custody and control of Canyon County Deputy Sheriff Mike Snyder for photographing the said maps and returning the original maps to the care, custody and control of the Clerk of the Supreme Court. The purpose of this motion is to secure usable copies of the maps which are required for the day to day county business and zoning matters. County Exhibit "6" consists of zoning maps used at public hearings. The undersigned has contacted attorney Kenneth F. White, counsel for the Plaintiff/Appellant, and can indicate to the Court that counsel has no objection to this motion.

DATED This 26 day of June, 1989.

RICHARD L. HARRIS
Prosecuting Attorney
Canyon County, Idaho

ss.
CHARLES L. SAARI
Deputy Prosecuting Attorney

ORDER

For good cause shown, the above motion is granted and Canyon County Sheriff's Deputy Mike Snyder is authorized to obtain from the Clerk of this Court County Exhibit "6" which the Clerk shall deliver to the said officer. It is further ordered that the county, through Officer Mike Snyder return the original County Exhibit "6" to the Clerk of the Court within two (2) weeks of the date of this order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That a true and correct copy of the foregoing Order, in unsigned form, was mailed to counsel for the Plaintiff/Appellant, Kenneth F. White, postage prepaid United States Mail, at his mailing address of P.O. Box 1099, Nampa, Idaho, 83653-1099, on this _____ day of June, 1989.

CHARLES L. SAARI
Deputy Prosecuting Attorney

17. Order Granting Release 7-14-89.

In the Supreme Court of the State of Idaho

RONALD McDONNELL, substituted for LEE RUME,	)
Plaintiff-Appellant,	) ORDER GRANTING MOTION TO RELEASE
vs.	) EXHIBIT NO. 6
BOARD OF COUNTY COMMISSIONERS, CANYON COUNTY, IDAHO,	) NO. 16921) Ref. No. 87S-202
Defendant-Respondent.	)

A MOTION TO RELEASE EXHIBIT No. 6 was filed by Respondent June 27, 1989, to allow copies to be made of the exhibit for day to day county business in zoning matters. An OBJECTION was filed by Appellant June 28, 1989. The Court is fully advised; therefore, good cause appearing,

IT IS HEREBY ORDERED that the MOTION TO RELEASE EXHIBIT No. 6 be, and hereby is, GRANTED.

IT IS FURTHER ORDERED that the Clerk of this Court shall return Defendant's exhibit No. 6 to the District Court Clerk for purposes of photocopying the exhibit and who shall refile exhibit No. 6 with this Court after making the copies.

DATED this 14th day of July, 1989.

By Order of the Supreme Court
ss.
Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge Gerald Weston
Adm. Judge Jim R. Doolittle

18. Plaintiff's Remand Exhibit E. Dick Winder's Testimony.

p. 7 of 10:

Dick Winder - Fred. I'd like to point out to you and to the other members of the Zoning Commission, that the only reason that this issue is an issue today is because we did'nt do our job at the time we adopted the new Zoning Ordinance, we did not have before us the zoning Maps of the County showing all the property that was zoned in the various ways that the zoning had occured. So as a result we hop skipped over this one, we hop skipped over the property on highway 30, at Bowmont, you can go all over this County, and you people are living on property and in many cases running businesses on property thats not now zoned for the kind of business you have on it and it's because we did'nt take the time to do the job that we should have done when we adopted that new zoning ordinance. Now I'm saying that in Mr. Gilberts case he bought that property at the time it was zoned commercial, it was zoned commercial then. It was changed by this Commission when it adopted the New Zoning Ordinance in the latter part of December of last year. Now I think we have an obligation to him like we have to any other citizen of this County to see that when they buy a piece of property that the rights go with that property are transferred to those citizens and that we as a zoning board in our limited wisdom of 12 people, don't take away the rights of the people individually. Now I am in accord with saying that, that area is protected as much as it can be. I'd like to ask Mr. Gilbert if he's able to live with the C-1 type of Zoning and a Planned Unit Development.

19. Transcript of Remand Hearing 7-31-85.

p. 120 L. 13-25, p. 122 L. 1-2:

MR. EISMANN: 1 or 2 questions, Mr. Winder. Were you specifically aware that property was being down zoned by the 1979 Zoning Ordinance at that time?

MR. WINDER: Yes, I was.

MR. EISMANN: Was Mr. Ottens aware that the property was being down zoned by that ordinance?

MR. WINDER: I can't speak for Mr. Ottens, but, I would guess that based on his experience that he was probably aware of what was occurring.

MR. EISMANN: Was any specific notice given to the public to your knowledge by Mr. Ottens or the Planning and Zoning Commission, or the Canyon County Commissioners in those words, that certain property owners or property is being down zoned?

MR. WINDER: Not to my knowledge.